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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

DANIEL VASQUEZ, Warden, and DANIEL E. LUNGREN, Attorney General of the State of California,

Petitioners,

v.

ROBERT JACKSON THOMPSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a United States District Court have jurisdiction to stay the execution of a state death penalty judgment where the prisoner has filed only a request for the appointment of counsel but has never filed a petition for writ of habeas corpus or anything that could reasonably be construed as a petition?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY, CONSTITUTIONAL, AND LOCAL COURT RULES INVOLVED	3
STATEMENT OF THE CASE	6
HOW THE FEDERAL QUESTION IS PRESENTED	13
STATEMENT OF FACTS	14
ARGUMENT	17
I. THE UNITED STATES DISTRICT COURT LACKED JURISDICTION TO STAY THE EXECUTION OF A STATE DEATH SENTENCE WHEN THE PRISONER FILED ONLY A REQUEST FOR THE APPOINTMENT OF COUNSEL BUT NOT A HABEAS CORPUS PETITION	17
CONCLUSION	43

TABLE OF AUTHORITIES

Cases	Page
Brown v. Vasquez 952 F.2d 1164 (9th Cir. 1991)	17, 38
Demosthenes v. Baal 495 U.S. 731 (1990)	22, 23, 25
Hooks v. Wainwright 540 F.Supp. 652 (1982)	28, 29
In re Blodgett ___ U.S. ___ 60 U.S.L.W. 3476 (1992 per curiam opinion)	20, 23, 39
In re Lindsey 875 F.2d 1518 (1989)	30
Keeney v. Tamayo-Reyes ___ U.S. ___ 60 U.S.L.W. 4339	33
McClesky v. Zant 499 U.S. _____ 111 S.Ct. 1454 (1991)	37
Modesto v. Nelson 296 F.Supp. 1375 (1969)	27
Moorer v. State of South Carolina 240 F.Supp. 529 (1964)	27
People v. Thompson 50 Cal.3d 134	34
Reese v. Teets 248 F.2d 147 (1957)	18, 26, 29

Rose v. Lundy
455 U.S. 509
(1982 per curiam opinion) 31

Shaw v. Martin
613 F.2d 487 (1980) 27

Smith v. Armontrout
825 F.2d 182 (1987) 27

U.S. v. One 1978 BMW
624 F. Supp. 491 (1985) 36

United States ex rel. La Marca v. Denno
159 F. Supp. 486 (1958) 27

Statutes

United States Code Title 18
§ 3006A(a)(2)(B) 37

United States Code Title 21
§ 848(q)(4)(B) 37, 38

United States Code, Title 28
§ 2251 26, 37

Court Rules

Central District Local Civil Rule
26.8.7 21, 40

Eastern District General Rule
191(h)(2) 19

Northern District Civil Rule
296-8(b) 19

Southern District Civil Rule
295-2(h)(2) 19

Other Authorities

Federal Habeas Corpus Practice and Procedure, Liebman
SS 4.3, 6.3, 9.3, 13.3, (1988) 28

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Daniel Vasquez, Warden, California State Prison at San Quentin, California, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, issued on March 12, 1992.

OPINIONS BELOW

The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit appears as Appendix A.

The unpublished order of the District Court appears as Appendix B.

JURISDICTION

Petitioner invokes the jurisdiction of this Court, under Title 28, United States Code, section 1254 (1) to review a judgment of the United States Court of Appeals for the Ninth Circuit which was filed on March 12, 1992. This petition is filed within the required 90-day period following the entry of judgment. The decision is a final decision.

STATUTORY, CONSTITUTIONAL, AND LOCAL COURT RULES INVOLVED

Title 18 United States Code section 3006A, subdivision (2)(b) states: "Whenever the United States magistrate or the court determines that the interests of

justice so require, representation may be provided for any financially eligible person who . . . (B) is seeking relief under section 2241, 2254, or 2255 of title 28."

Title 21 United States Code section 848, subdivision (q)(4)(b) states: "In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)."

Title 28, United States Code section 2251 states: "A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final

judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

Local Civil Rule 26.8.7 of the United States District Court for the Central District of California states:

"(a) Stay Pending Final Disposition: Upon the filing of a habeas corpus petition, unless the petition is patently frivolous, the district court shall issue a stay of execution pending final disposition of the matter.

(b) Temporary Stay for Appointment of Counsel: Where counsel in state court proceedings withdraws at the conclusion of the state court proceedings or is otherwise not available or qualified to proceed, the selection panel will designate any attorney from the panel who

will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon the filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay shall remain in effect for forty-five (45) days unless extended by the court."

STATEMENT OF THE CASE

Respondent was convicted of the murder of a twelve year-old boy and sentenced to death by a California Superior Court. The conviction was affirmed on direct appeal by the California Supreme Court. People v. Thompson, 50 Cal.3d 134, 266 Cal.Rptr. 309, 785 P.2d 857 (1990). Respondent's petition for rehearing was denied by the California Supreme Court. People v. Thompson, (1990 Cal. LEXIS 2644). Respondent's petition for writ of certiorari was denied by this Court. Thompson v. California, ___ U.S. ____, 111 S.Ct. 226, 112 L.Ed.2d 180 (1990). Respondent's petition for rehearing was subsequently denied by this Court. Thompson v. California, 111 S.Ct. 720, 112 L.Ed.2d 708 (1991).

Respondent never filed a petition for habeas corpus in the state court system.

On October 30, 1990, the California Superior Court, in and for the County of Orange, set respondent's execution date for December 28, 1990.

On December 5, 1990, respondent filed a pro se request for the appointment of counsel and a request for a stay in the United States District Court for the Central District in California. Although respondent stated he intended to file a petition for writ of habeas corpus at some undesignated time in the future in which he would raise federal constitutional errors, the request for stay contained no allegations of federal constitutional violations in the state court proceedings. Nor did the request for counsel contain any allegation that any federal issue had been exhausted in the state courts. (App. C.) Nevertheless, the District Court issued a forty-five day stay of execution

pursuant to Central District Local Civil Rule 26.8.7.

On January 16, 1991, an application for extension of the stay was filed on behalf of respondent. The District Court granted a 30-day extension to February 19, 1991.

A second application for extension of the stay was filed on behalf of respondent on February 15, 1991. The District Court issued its order extending the stay for an additional 30 days, to March 21, 1191.

Petitioner then filed a motion to vacate the stay of execution and, in the alternative, to object to any further stays. In this motion, petitioner raised the issue that the District Court lacks jurisdiction to issue a stay in the absence of a formal petition for writ of habeas corpus. Together with the motion, petitioner filed an ex parte application for an order shortening time for the

hearing on the motion. Petitioner's ex parte application stated that petitioner had learned about the District Court's granting of the initial stay and the subsequent two extensions of the stay after the fact and that petitioner sought to be heard on the merits of the motion to vacate before the stay dissolved on March 21, 1991. The District Court denied petitioner's ex parte application for order shortening time and set the hearing on the motion to vacate for March 25, 1991.

On March 21, 1991, the District Court appointed counsel for respondent. On that same date, appointed counsel filed an application for a 120-day stay of execution. Also on that same date, the District Court granted the request for the 120-day stay.

On March 28, 1991, the District Court denied petitioner's motion to vacate the

stay of execution, finding the motion was rendered moot by the granting of a stay on March 21, 1991. (App. B.)

Petitioner filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. In an unpublished memorandum opinion filed on March 12, 1992, that court affirmed the decision of the District Court and held that the District Court had jurisdiction to enter a stay of execution on the basis of respondent's request for appointment of counsel. The appellate court cited to its prior decision in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. den., Vasquez v. Brown 118 L.Ed.2d 435. (App. A.)[1/]

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1. The petition for writ of certiorari in Brown presented the same question as in the instant petition. It should be noted that the case at bar differs from Brown in two significant aspects. First, there has been no habeas corpus petition filed by respondent Thompson in federal court. In contrast, Brown had filed a federal

While the case was pending before the Court of Appeals, the District Court, at respondent's request, further extended the stay of execution. On December 9, 1991, the District Court extended the stay to July 1, 1992. On December 16, 1991, the District Court ordered that the petition for writ of habeas corpus be filed by June 15, 1992.

On May 21, 1992, the District Court issued an order vacating the briefing schedule and extending the stay to September 1, 1992. The total stay period granted so far by the District Court amounts to about two years.

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petition before the Ninth Circuit issued its judgment affirming the district court's jurisdiction to issue a stay. Second, while Brown was denied relief on habeas corpus by the California Supreme Court following his direct appeal, there has been no habeas corpus petition filed by respondent Thompson in the state courts. In sum, unlike the inmate in Brown, respondent Thompson has never filed any habeas corpus petition, either in the state court system or the federal court system.

No petition for habeas corpus has been filed by respondent in the District Court.

HOW THE FEDERAL QUESTION IS PRESENTED

In the United States District Court, petitioner moved to vacate the stay of execution order contending that the District Court lacked jurisdiction to issue a stay in the total absence of a petition for writ of habeas corpus or anything that could reasonably be construed as a petition for writ of habeas corpus.

When the District Court ruled denying petitioner's motion to vacate the stay of execution as moot, petitioner filed a timely notice of appeal with the United States Court of Appeals for the Ninth Circuit. That court affirmed the decision of the District Court, holding the lower court had jurisdiction to issue a stay of execution on the basis of respondent's request for appointment of counsel.

STATEMENT OF FACTS

The initial filing by the respondent on December 5, 1990, requested the appointment of counsel to represent him in federal habeas corpus proceedings. The request also asked for a stay of execution. (See App. C.) In a declaration filed in support of his request, respondent stated in pertinent part as follows:

> "I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need the assistance of counsel in preparing and litigating the petition." (App. C-4.)

Although respondent stated he intended to file a petition for writ of habeas corpus at some undesignated time in the future, the request for stay contained no

allegations of federal constitutional violations during the state court proceedings. Additionally, the request made no allegations that any federal claims had been exhausted in the state courts. Nevertheless, the District Court issued a stay and then later denied petitioners' motion to vacate the stay.

In a memorandum decision issued on March 12, 1992, the United States Court of Appeals for the Ninth Circuit upheld the jurisdiction of the district court to stay execution of a state death sentence on the basis of the request for the appointment of counsel. In its single sentence memorandum decision, the Court of Appeals cited to its own prior opinion in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), cert. den., Vasquez v. Brown, 118 L.Ed.2d 435. (App. A.) In Brown, the Ninth Circuit held that the federal trial court had jurisdiction to properly issue a stay

of execution of a state death sentence where the prisoner had filed only a request for counsel but had never filed a federal habeas corpus petition or anything that could reasonably be construed as such.

ARGUMENT

I

THE UNITED STATES DISTRICT COURT LACKED JURISDICTION TO STAY THE EXECUTION OF A STATE DEATH SENTENCE WHEN THE PRISONER FILED ONLY A REQUEST FOR THE APPOINTMENT OF COUNSEL BUT NOT A HABEAS CORPUS PETITION

In this state death penalty case, the Court of Appeals for the Ninth Circuit applied its recent ruling in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), to uphold the district court's jurisdiction to issue a stay of execution in the absence of a federal habeas corpus petition. In Brown, the Ninth Circuit ruled that a federal district court has the inherent power to stay the execution of a state death sentence even though the prisoner has not filed a petition for habeas corpus but has only filed a request for counsel. Petitioner submits the decision of the Ninth Circuit in this case--as well as in Brown--is in error.

A United States District Court has no inherent power to stay execution of a state death sentence. The District Court "has no power to stay the execution of judgment of a state court save as an incident to the exercise of its jurisdiction in habeas corpus." (Reese v. Teets, 248 F.2d 147, 149 (9th Cir. 1957) The power to stay a state court death order is solely statutory, as is the power of the court to appoint counsel. There is no inherent authority for a United States District Court to stay a state court proceeding apart from its specific habeas jurisdiction. This Court should grant certiorari to instruct the lower federal courts on the limits of their jurisdiction to grant a stay of execution where no habeas corpus petition has ever been filed.

This is not a concern limited to the Central District of California, from where

both this case and Brown originated. With the approval of the Ninth Circuit, every federal district in California has adopted rules for conducting death penalty habeas corpus proceedings which permit the issuance of a stay order by a district court before any petition for habeas corpus has been filed. (See Eastern District General Rule 191(h)(2), Northern District Civil Rule 296-8(b), Southern District Civil Rule 295-2 (h)(2).) In at least thirty seven (37) capital cases in which petitioner is named as a party, stays have been issued by United States District Courts when no petition for writ of habeas corpus has been filed.[2/] Indeed, some of these cases were delayed for as long as two years without a petition being filed! (See entries number 17 and 27 on

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2. A listing of the cases where a stay of execution has been issued by a federal district court in the absence of a habeas corpus petition is set forth in Appendix D at D-1 through D-5.

Chart One, Appendix D, pages D-3 and D-4.) There are another 300 prisoners on California's death row, the majority of whom, predictably, will be filing similar requests for stays. Thus, the problem presented in this case, through the application of the Brown decision, is merely the first of an onslaught of cases from California's death row which will soon engulf the federal district courts in California. Unless this Court acts, petitioner faces the very real prospect of having to deal with hundreds of stay orders issued by federal district courts in the total absence of any colorable showing of a constitutional violation and in the total absence of any claim of exhaustion. This Court should act before this practice works to improperly delay scores of death judgments. (See In re Blodgett ___ U.S. ____ , 112 S Ct. 674,

116 L.Ed.2d 669, (1992 Per curiam opinion).)

Rule 26.8.7 of the Local Civil Rules of the Central District of California purports to authorize the District Court to issue a temporary stay of execution when a state prisoner sentenced to death applies for the appointment of counsel to assist him in preparing a federal habeas corpus petition. Once counsel is appointed, an additional temporary stay may be granted to allow counsel an opportunity to review the record and prepare a full petition. Under the local rule, the stays may be granted without the need for any petition, or its functional equivalent, to be filed. Such stays may be granted in the total absence of a claim that any issues at all have been exhausted in the state courts. Petitioner submits that a district court has no jurisdiction to enter a stay under those circumstances.

The filing of a valid petition containing exhausted claims is a necessary prerequisite to the federal court having jurisdiction to intrude into the state court proceedings. There is no dispute that after a habeas corpus petition has been filed a district court has the power to issue a stay of a state execution. But the district court has no such power unless and until such a petition has been filed.

The decision of this Court in Demosthenes v. Baal, 495 U.S. 731, 110 S.Ct. 2223, 109 L.Ed.2d 762, (1990), decided after the local rule was adopted, makes it absolutely clear that a federal court has no jurisdiction to issue a stay unless a valid habeas corpus petition has first been filed by the inmate. Moreover, the local rule is incompatible with the explicit order of this Court in Blodgett that a federal court must not issue a stay

in a state capital case unless it takes "all steps necessary" to resolve the matter expeditiously. (In re Blodgett, ___ U.S. ____ , 116 L.Ed.2d 669, 674-675, (1992 Per curiam opinion) Indeed, this assumed power to issue a stay in the absence of a petition is an invitation to delay.

In Demosthenes v. Baal, supra, a Nevada inmate, Thomas Baal, was a week away from his execution date. He chose not to pursue any further federal collateral review. Nevertheless, his parents filed a petition for federal habeas corpus relief as "next friend" of Thomas Baal. The petition alleged that Baal was not competent to waive federal review of his claims. The District Court held hearings on the claim and then denied relief holding that the court had no jurisdiction to entertain the petition. A certificate of probable cause was denied.

The parents appealed to the Ninth Circuit. A divided panel of the Ninth Circuit granted the parents a certificate of probable cause and issued a stay.

This Court vacated the stay and held that because the parents had not made a sufficient showing of mental incapacity, the District Court was without jurisdiction to issue a stay. In the absence of a valid petition for habeas corpus, the District Court had no jurisdiction to act. This Court specifically noted that:

> ". . . federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances. Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of

federal power. In this case, that basis was plainly lacking. The State is entitled to proceed without federal intervention." Demosthenes v. Baal, supra, 495 U.S. at 737, 109 L.Ed.2d at 769 (emphasis added).

Because no petition for writ of habeas corpus had been filed by respondent in this case, the District Court had no jurisdiction to issue a stay. A mere statement a state prisoner wishes to file a federal habeas corpus petition at some undesignated time in the future is insufficient. Without some type of actual petition alleging suitable grounds for relief, a district court lacks jurisdiction to issue any stay. The actions of the District Court and the Ninth Circuit were completely contrary to the holding in Baal and require this

Court's intervention. A writ of certiorari should issue.

Title 28 United States Code section 2251 authorizes the issuance of stay by the judge "before whom a habeas corpus proceeding is pending." As mentioned above, in Reese v. Teets, 248 F.2d 147 (9th Cir. 1957), the Ninth Circuit specifically held that a district court "has no power to stay the execution of judgment of a state court save as an incident to the exercise of its jurisdiction in habeas corpus." (Id., at 149.)[3/] Although the petition in Reese was found to be defective, and thus outside the court's jurisdiction because it raised unexhausted claims, other courts have granted stays in order to preserve their jurisdiction while state proceedings are

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3. While it is true that the procedural framework surrounding *Reese* has been greatly changed, the statements of the limitation of the district court's power still have validity.

completed. In each case, however, an actual petition for habeas corpus had been filed in the District Court and its allegations formed the basis for a stay request. (See e.g., Modesto v. Nelson, 296 F.Supp. 1375 (ND Calif. 1969); Moorer v. State of South Carolina, 240 F.Supp. 529 (ED SC 1964); United States ex rel. La Marca v. Denno, 159 F.Supp. 486 (SD NY 1958); see also Smith v. Armontrout, 825 F.2d 182 (8th Cir. 1987) [stay of execution in conjunction with habeas corpus petition by relative challenging the inmate's competency to waive further appeals].)

In Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980), the Fourth Circuit noted in ruling on an application for stay of an execution date that a federal court's authority is limited to preserving its own jurisdiction, although a stay may

effectively permit proceedings to continue in other courts as well. (Id., at 491, n. 1.) Petitioner has found no published decision other than Brown, the one applied here, in which a district court acted without a petition before it. However, in at least thirty seven (37) cases in which petitioner is named party, the United States District Courts in California have issued stays when no petition had been filed. (See Appendix D.)

The few relevant authorities support the conclusion that a petition is an absolute jurisdictional prerequisite to the issuance of a stay. (See generally Liebman, Federal Habeas Corpus Practice and Procedure §§ 4.3, 6.3, 9.3, 13.3, (1988).) The most useful decision is Hooks v. Wainwright, 540 F.Supp. 652 (M.D. Fla. 1982), a class action by Florida death row prisoners which challenged access to the courts and the right to

counsel. A member of the class, Timothy Palmes, sought a stay of his execution date from the court before whom the class action suit was pending. Palmes argued that a previous order in the case, which compelled the state to formulate a plan for providing death row inmates with counsel,[4] entitled him to a stay so that Florida could appoint an attorney for the purpose of preparing state and federal collateral attacks on his judgment. (Hooks v. Wainwright, supra, 540 F.Supp. at 653-654.) Citing Reese v. Teets, supra, the court concluded that a federal court could issue a stay "only in connection with a habeas corpus proceeding." Id., at 654. "[T]he principle enunciated in Reese . . .

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4. The district court's holding on this issue was subsequently reversed by the Court of Appeals, which held that the state had no obligation to provide counsel for collateral attacks on the conviction. (Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985), cert. denied, 479 U.S. 913 (1986).)

is, that federal judicial authority to stay execution of a sentence . . . is limited to cases in which the court's habeas corpus jurisdiction has been properly invoked." (Id., at 655; emphasis added.) The court concluded that habeas corpus is "the only legal remedy that potentially offers the primary relief which [Palmes] is seeking, i.e. stay of his execution." (Id.) Petitioner has found no authority for the proposition that habeas corpus jurisdiction is invoked solely by expressing an expression of intent to seek such relief. Hooks supports the conclusion that a stay may not be issued unless the petition has been filed. (See also In re Lindsey, 875 F.2d 1518, 1519 (11th Cir. 1989).)

Additionally, in the absence of a petition for habeas corpus there is no way for a district court to ascertain if any of the potential, but as yet unraised,

claims have been exhausted in the state courts. This Court has made it abundantly clear that a United States District Court may not consider a federal habeas corpus petition unless all of the claims presented have been exhausted in the state courts. Failure to exhaust state remedies as to every claim made in a petition for writ of habeas corpus requires dismissal of the entire petition without reaching the merits of any of the claims. (Rose v. Lundy 455 U.S. 509, 522.(1982 per curiam opinion).) If there is no petition, there can be no showing of exhaustion. Without a showing of exhaustion the court is required to dismiss the petition. Thus, the position assumed by the Ninth Circuit, as explained in Brown and as applied in the case at bar, is also applicable to all three hundred (300) prisoners on California's death row, and potentially applicable to all the other inmates in the

states in the Circuit that have capital punishment. As vividly illustrated by the instant case, the Ninth Circuit would allow--as it did in Brown and again in this case--the issuance of a stay without either the filing of a petition or the allegation of exhaustion by the inmate. This Court should act to prevent such a substantial, unauthorized expansion of the limited, statutory powers of the federal district courts.

> This Court has recently stated that: "[t]he purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court. Comity concerns dictate that the

requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the state must afford the petitioner a full and fair hearing on the federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." Keeney v. Tamayo-Reyes, ___ U.S. ___, 60 U.S.L.W. 4339, 4341-4342, (1992).

The situation created by the District Court's granting of the stay in this particular case offends the exhaustion doctrine and leads to manipulation of the federal court system to gain further delays. In the District Court, respondent has filed a declaration that states investigation of the conduct of respondent's trial counsel is necessary

and that "[e]vidence collected regarding the defense counsel . . . will bear directly on issues to be raised in Mr. Thompson's federal habeas corpus petition." (App. E-10-11.) However, the issue of competency of counsel has never been presented by respondent to the state court. Competency of counsel is not among the issues raised in the direct appeal to the California Supreme Court. (See, People v. Thompson, supra, Cal.3d 134.) Moreover, the competency of counsel issue has not been presented by collateral attack in a state court proceeding as respondent has never filed a habeas corpus petition in the state courts. It is evident that respondent's case is not yet ripe for review by the federal courts on habeas proceedings, yet he has been able to enter the District Court and obtain a total stay period of about two years. The stay is permitting respondent to

investigate this unexhausted claim in preparation for a federal habeas corpus petition--a defective petition that will require this case to go back to the state court system and cause even further delay. This Court should not permit such flagrant abuse of the federal court system.[5]

It must be stressed that the result petitioner seeks does not place an onerous burden on a death row inmate. All an inmate would need to do is fill out the standard preprinted federal habeas corpus form and set forth the federal issues presented to the state supreme court in the direct appeal or any companion habeas corpus petition and add a statement that the matters have been exhausted. This could be accomplished by merely copying

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5. Further promoting a total disregard for the exhaustion doctrine, the District Court has ordered respondent's investigator " . . . to complete his investigation of all exhausted and unexhausted state claims . . ." (App. F-3-4, emphasis added.)

the table of contents of each document onto the standard federal habeas corpus petition form and adding the relevant factual information. Surely asking a death row inmate to do what every other state prisoner who seeks federal relief must do-fill out a pre-printed habeas corpus petition form-cannot be considered overly difficult or arduous. (Cf. U.S. v. One 1978 BMW 624 F. Supp. 491, 492 (D. Mass 1985) ["So long as one is able to obtain paper, pencil and a stamp the effort . . . is minimal."].) Once such a proper petition has been presented, the court has jurisdiction to issue a stay and can appoint counsel[6/] who can more fully present the legal arguments to the court.

Furthermore, there is no validity to the Ninth Circuit's assertion that because

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6. Just as important, the court may be able to determine that the proposed issues are without merit and deny the petition outright.

the District Court had the power to appoint counsel it had the power to stay the state proceedings. Without a petition, the District Court had neither the power to appoint counsel nor the power to stay the state execution order. As this Court has specifically held, there is no constitutional right to counsel in federal habeas corpus proceedings. (McClesky v. Zant 499 U.S.___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).) The right to appointment of counsel is strictly statutory. (Title 18 U.S.C. section 3006A(a)(2)(B); Title 21 U.S.C. section 848(q)(4)(B); Title 28 U.S.C. section 2251.)

Under each of these statutes, appointment of counsel can be undertaken by the court only if the proceeding has reached the point where it can be said there is an action pending. In Title 18 U.S.C. section 3006A (a)(2)(B) the statute

requires that there be a financially eligible person "seeking relief." In the case at bar, the prisoner was not yet seeking relief in any way. He specifically stated that the request for relief might come at some time in the future. It cannot be said that the request for counsel could be construed as an inmate "seeking relief." Similarly, Title 21 U.S.C. section 848 (q)(4)(B) requires that there be proceedings under section 2254. But a section 2254 action requires the filing of a petition. And as the Ninth Circuit impliedly found in the case at bar and specifically expressed in Brown, the death row inmate's request for counsel could in no way be construed as a petition for writ of habeas corpus. (See, App. A; see also, Brown v. Vasquez, supra, 952 F.2d at 1166.)

In summary, because none of the prerequisites for appointment of counsel

had been meet, the District Court lacked jurisdiction to appoint counsel. Since the power to appoint counsel was the sine qua non of the Ninth Circuit's decision, the District Court lacked either direct authority or jurisdiction tied to the right to appoint counsel upon which to base a stay order. Thus, it is evident that without the filing of a habeas corpus petition, or a document that can be liberally characterized as such, a United States District Court lacks not only the power to appoint counsel but also lacks the jurisdiction to stay a state-ordered death sentence.

Additionally, petitioner submits that this Court's recent decision in In re Blodgett ___ U.S.___, 116 L.Ed.2d 669 (1992 Per curiam opinion) directed to the Ninth Circuit, has supplanted both the decision of the Ninth Circuit in the case at bar as well as Central District Local

Rule 26.8.7. In Blodgett, this Court addressed the Ninth Circuit's two and a half year delay of a Washington capital case in which that court had granted a stay of the execution date. This Court's per curiam opinion found that the state had been prevented from "exercising its sovereign power to enforce the criminal law." This Court held that this was an interest which had to be accorded "great weight." This Court found that the Ninth Circuit, having granted the stay, had a duty to consider the claims raised by the petitioner without delay because of the potential of prejudice to the State of Washington. If a stay can issue in the absence of any alleged basis for federal jurisdiction, then there is no possible way for the court to consider the claims on the merits "without delay." Thus the decision of the Ninth Circuit in the case at bar is in direct conflict with the

strong state interests identified by this Court in Blodgett. A stay issued where a habeas petition has not been filed violates the clear policy dictates of this Court in Blodgett.

Therefore, a United States District Court has no inherent power to either appoint counsel or stay the state court judgment. Only once a proper habeas corpus petition is filed does a District Court acquire jurisdiction sufficient to appoint counsel and/or stay the state court's sentence. In the case at bar, because the Ninth Circuit impliedly found--through its reliance on Brown--that no document had been filed that could be considered a petition for habeas corpus, the District Court lacked the authority to stay the state court judgment. The District Court acted in excess of its jurisdiction and to the substantial detriment of the state when it stayed the

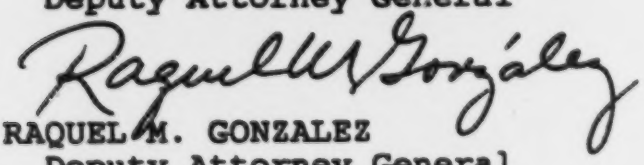
execution date. The Ninth Circuit's decision proclaiming an inherent power to stay as a concomitant to the power to grant counsel is unsupported in either case law or any decision of this Court. This Court should grant certiorari to clarify that a United States District Court has no power to intervene in a state's enforcement of it own laws and judgments unless and until a federal habeas corpus petition is actually filed.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California
GEORGE WILLIAMSON, Chief
Assistant Attorney General
GARY W. SCHONS, Senior
Assistant Attorney General
ROBERT M. FOSTER, Supervising
Deputy Attorney General



RAQUEL M. GONZALEZ
Deputy Attorney General

Attorneys for Petitioner

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

No:

October Term, 1991

DANIEL E. LUNGREN
Attorney General of
the State of California

RAQUEL M. GONZALEZ
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

Attorneys for Petitioners

ROBERT JACKSON THOMPSON,

Respondent.

v.

DANIEL VASQUEZ,

Petitioner.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have caused service of the within

PETITION FOR WRIT OF CERTIORARI AND APPENDICIES

To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named below as follows: each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 29th day of May, 1992.

Cathy Catterson, Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939

Kent Scheidegger
Attorney at Law
2131 L St
P.O. Box 1199
Sacramento, CA 95812

Honorable James M. Ideman
U.S. District Court, Central District
312 North Spring Street
Los Angeles, California 90012-4793

Daniel Vasquez, Warden
of California State Prison
at San Quentin
San Quentin, California 94964

Paul L. Gabbert (3 copies)
Attorney at Law
2115 Main Street
Santa Monica, California 90405

Norma W. Mitchell, Esq. (3 copies)
1541 Ocean Avenue, Suite 200
Santa Ana, California 90401

There is a delivery service by United States Mail and/or courier service at each place so addressed or regular communication by United States Mail and/or courier service between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, May 29, 1992.

Rosemary Carmona
ROSEMARY CARMONA

Subscribed and sworn to before me
this 29th day of May, 1992.

Anne Marie Bujord

ANNE MARIE BUJORD
Notary Public—California
County of San Diego
My Commission Expires [illegible]

Notary Public in and for said County and State

91-1930 (3)

No. _____

Supreme Court, U.S.
FILED
JUN 1 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

DANIEL VASQUEZ, Warden, and DANIEL E. LUNGREN, Attorney General of the State of California,

Petitioners,

v.

ROBERT JACKSON THOMPSON,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN, Attorney General of the State of California
GEORGE WILLIAMSON, Chief Assistant Attorney General
GARY W. SCHONS, Senior Assistant Attorney General
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Attorneys for Petitioners

TABLE OF CONTENTS

APPENDIX A

United States Court of Appeals for the Ninth Circuit, Memorandum Opinion A-1 - A-2

APPENDIX B

United States District Court Central District of California, Order Denying Respondent's Motion to Vacate Stay of Execution B-1

APPENDIX C

Request for Appointment of Counsel in Death Sentence Case and for Stay of Execution of Death Sentence C-1 - C-2

Declaration in Support C-3 - C-5

APPENDIX D

Chart: Cases In Which United States District Courts In California Have Stayed State Ordered Executions In The Absence Of A Petition For Writ Of Habeas Corpus D-1 - D-5

APPENDIX E

Declaration of Keith Rohman E-1 - E-11

APPENDIX F

United States District Court
Central District of California,
Order Granting Petitioner's
Application for an Extension
of the Temporary Stay F-1 - F-3

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT JACKSON THOMPSON, Petitioner-Appellee, v. DANIEL VASQUEZ, Warden, Respondent-Appellant.	No. 91-55525 D.C. No. CV-90-6605-JMI MEMORANDUM*

Appeal from the United States District Court for the Central District of California
James M. Ideman, District Judge, Presiding
Submitted** March 6, 1992

Before: HUG, D.W. NELSON, and HALL, Circuit Judges.

The district court had jurisdiction to enter a stay of execution on the basis of Thompson's request for appointment of counsel. Brown v. Vasquez, No. 90-56127 (9th Cir. Feb. 19, 1992).

AFFIRMED.

---

* This disposition is not appropriate for publication and may not be cited to or

by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument pursuant to Fed. R. App. P. 34(a) and 9th Cir. R. 34.4.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT JACKSON THOMPSON, Petitioner, v. DANIEL VASQUEZ, Warden, Respondent.	CV-90-6605-JMI ORDER DENYING RESPONDENT'S MOTION TO VACATE STAY OF EXECUTION

IT IS HEREBY ORDERED:

The Court, having read and reviewed Respondent's motion to vacate the stay of execution, finds that the motion is rendered moot by this Court's granting of a stay on March 21, 1991. Therefore, Respondent's motion is hereby DENIED.

IT IS SO ORDERED.

DATED: March 27, 1991

/s/
James M. Ideman
United States District Judge

APPENDIX C

ROBERT JACKSON THOMPSON
P. O. Box C-78000
Tamal, CA 94974
In Pro Per

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT JACKSON THOMPSON, Petitioner, v. DANIEL VASQUEZ, as Warden of San Quentin State Prison, Respondent.	Case No. CV 90-6605-JMI REQUEST FOR APPOINTMENT OF COUNSEL IN DEATH SENTENCE CASE AND FOR STAY OF EXECUTION OF DEATH SENTENCE

I, Robert Jackson Thompson, request that this Court appoint an attorney to represent me in federal habeas corpus proceedings in my death sentence case. (Local Rule 26.8.4 (iv).)

On October 1, 1990, the United States Supreme Court denied my petition for writ of certiorari, following affirmance of the

judgment of death by the California Supreme Court on February 8, 1990.

The Orange County Superior Court has set December 28, 1990, as the date for execution of the judgment of death.

WHEREFORE, under Local Rule 26.8.4 (iv) of the Central District of California, petitioner Thompson requests that competent and qualified counsel be appointed to represent him in Federal habeas corpus proceedings. Petitioner further requests that this Court stay petitioner Thompson's execution of death sentence, scheduled for December 28, 1990, for forty-five (45) days to permit the appointment of counsel. (Local Rule 26.8.7(b).)

DATED: December 3, 1990

Respectfully submitted,

/s/
ROBERT JACKSON THOMPSON

ROBERT JACKSON THOMPSON
P.O. Box C-78000
Tamal, CA 94974

In Pro Per

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT JACKSON THOMPSON Petitioner, v. DANIEL VASQUEZ, as Warden of San Quentin State Prison, Respondent.	Case No. DECLARTION IN SUPPORT OF REQUEST BY PRISONER UNDER CALIFORNIA DEATH JUDGMENT FOR APPOINTMENT OF COUNSEL AND STAY OF EXECUTION

I, Robert Jackson Thompson, request that the Court appoint an attorney to represent me in death penalty habeas corpus litigation to be initiated in the federal courts in my behalf. In support of this request, I hereby declare:

1. I was sentenced to death in the Orange County Superior Court, State of California, on December 6, 1983. I am

incarcerated at San Quentin State Prison, located in Tamal, California.

2. My death sentence was affirmed by the California Supreme Court on February 8, 1990. My petition for writ of certiorari was denied on October 1, 1990.

3. I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need the assistance of counsel in preparing and litigating the petition.

4. The attorney who represented me in the most recent state court proceedings was Hugh Anthony Levine. He has informed me that he is not available to represent me as lead counsel in federal habeas corpus proceedings.

5. I cannot afford to retain an attorney to represent me in these proceedings. I am indigent and have

substantially no assets. At present I have approximately $120.00 in my account.

I DECLARE UNDER PENALTY OF PERJURY THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT.

DATED: December 3, 1990

/s/
ROBERT JACKSON THOMPSON

APPENDIX D

CHART ONE

CASES IN WHICH UNITED STATES DISTRICT COURTS IN CALIFORNIA HAVE STAYED STATE ORDERED EXECUTIONS IN THE ABSENCE OF A PETITION FOR WRIT OF HABEAS CORPUS

NYF=Habeas Petition Not Yet Filed

Petitioner's Last Name	District Court Case Number	District	Date of stay	Date Habeas Petiton Filed
1.Anderson	CV-92-0488-JGD	CD	1-24-92	NYF
2.Bean	CIV-S-90-0648-EJG-GGH	ED	6-8-90	7-18-91
3.Bell	C-91-1115-FMS	ND	4-12-91	NYF
4.Boyde	CV-91-2522-WDK	CD	5-13-91	NYF
5.Brown	CV-90-2815-AWT	CD	6-1-90	11-06-91
6.Burton	CV-91-1652-AWT	CD	3-27-91	NYF
7.Caro	C-89-1400-GPV	ND	4-24-89	4-27-90
8.Carrera	CV-F-90-478-EDP-P	ED	8-6-90	8-26-91
9.Coleman. C.	C-90-1588-VRW	ND	6-1-90	7-15-91
10.Coleman, R.	C-89-1906-RFP	ND	6-2-89	1-19-90

Petitioner's Name	District Court Case Number	District	Date of stay	Date Habeas Petiton Filed
11.Douglas	CV-91-3055-RSLW	CD	6-7-91	NYF
12.Fields	CV-92-0465-RG	CD	1-23-91	NYF
13.Frank	CV-91-6287-AHS	CD	11-22-91	NYF
14.Ghent	C-90-2763-WAI	ND	10-1-90	NYF
15.Hamilton	CV-F-90-363-OWW-P	ED	6-18-90	12-03-91
16.Howard	CV-88-7240-WJR	CD	1-24-89	9-25-89
17.Hunter	C-90-3275-JW	ND	11-26-90	NYF
18.Jackson	CV-91-6983-JG-DEE	CD	8-8-91	NYF
19.Jennings,M.	C-89-1360-WAI	ND	11-7-89	4-17-91
20.Jennings,W.	CV-F-91-684-OWW-P	ED	12-16-91	NYF

Petitioner's Name	District Court Case Number	District	Date of stay	Date Habeas Petiton Filed
21.Johnson	C-90-3219-DLJ	ND	11-9-90	NYF
22.Kimble	CV-90-4826-SVW	CD	9-12-90	9-17-91
23.Lang	CV-91-4061-JMI	CD	7-30-91	NYF
24.Mattson	CV-91-5453-WJR	CD	10-9-91	NYF
25.McLain	CV-89-3061-JGD	CD	5-18-89	12-28-90
26.Miller	CV-91-2652-KN	CD	5-16-91	NYF
27.Miranda	CV-89-7130-RJK	CD	12-15-89	NYF
28.Morales	CV-91-0682-DT	CD	2-8-91	NYF
29.Odle	C-88-4280-CAL	ND	10-24-88	5-31-89
30.Ramirez	CV-91-3802-CBM	CD	7-12-91	NYF

Petitioner's Name	District Court Case Number	District	Date of stay	Date Habeas Petiton Filed
31.Rich	CV-S-89-0823-EJG-GGH	ND	6-8-89	NYF
32.Robbins	CV-91-4768-TJH	CD	9-4-91	NYF
33.Siripongs	CV-89-6530-WDK	CD	11-9-89	7-6-90
34.Stankewitz	CV-F-91-616-OWW-P	ED	11-15-91	NYF
35.Taylor	C-921627-MHP	ND	5-4-92	NYF
36.Thompson,R.	CV-90-6605-JMI	CD	12-15-90	NYF
37.Thompson,T.	CV-89-3630-RAG	CD	6-15-89	1-16-90
38. Turner	CV-F-91-153-REC-P	ED	3-29-91	NYF

APPENDIX E

PAUL L. GABBERT, ESQ.
2115 Main Street
Santa Monica, CA 90405
213/399-3259

Attorney for Petitioner,
Robert Jackson Thompson

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT JACKSON THOMPSON, Petitioner, v. DANIEL VASQUEZ, as Warden of San Quentin State Prison, Respondent.	Case No. CV 90-6605-JMI DECLARATION OF KEITH ROHMAN

KEITH ROHMAN, being first dully sworn, declares:

1. I am a private investigator, licensed in the State of California under license number PI10349. I have been employed as a private investigator for the last ten years. A significant percentage of my practice has involved the field of capital litigation. At both the trial and

appellate levels, I have conducted the defense investigation on fourteen capital cases. I have testified in state and federal court as a defense investigator on dozens of occasions, including during capital trials. I have served as an instructor in the field of private investigation, and have attended numerous CLE-approved training seminar on capital litigation. I am the author of an article on reciprocal discovery in the Journal of the National Association for Criminal Investigators and the California Attorneys for Criminal Justice Forum magazine. A copy of my curriculum vitae is attached hereto as Exhibit A.

2. In addition to my investigative experience in conducting background investigations, witness interviews and compiling social histories, I have extensive experience in post-conviction interviews of jurors. I have interviewed

numerous juries as part of the post-conviction work in capital cases, and have obtained signed declarations from jurors relating to possible juror misconduct. I am also regularly retained by the Los Angeles City Attorney's Office to interview jurors post-conviction in police misconduct cases.

3. Approximately six weeks ago, at the request of attorney Paul L. Gabbert, I began a review of the materials in the case of People v. Robert Thompson. Mr. Gabbert requested that I determine what investigation, if any, should be conducted as part of the on-going post-conviction proceedings pending in the United States District Court. An associate in my office has contacted trial counsel and the trial court defense investigator, and obtained their files. I have consulted with Mr. Gabbert and representatives of the California Appellate Project regarding

this case. I have also held an initial meeting with the defense investigator Thomas Gleim, and conducted an initial review of the trial lawyers' and investigator's files.

4. There are several issues relating to the jury in this case which merit further investigation. The trial judge in the defendant's guilt trial entered the jury room to explain his failure to provide the proper verdict form to them. On another occasion, the court reporter was present in the jury room without the judge, counsel or defendant being present. The judge at the penalty re-trial gave the jury no admonition regarding note taking. There was a dictionary present in the jury room during the trial. The California Supreme Court opinion in People v. Thompson, 50 Cal.3d 134 (1990) observes that no evidence was presented on the issue of misconduct relating to the court

reporter, the dictionary or the note-taking admonition. As far as I can determine, there have been no interviews conducted with either the first guilt phase jury, or the second penalty phase jury. I believe members of these juries need to be located and interviewed about these and other possible areas of jurors misconduct.

5. Declarant is also informed that Mr. Gabbert has reviewed and summarized the entire section of the record on direct appeal pertaining to trial and penalty phase voir dire during the first guilt and penalty trials. Declarant has not yet reviewed Mr. Gabbert's summary but is aware that he had identified additional juror issues which may merit investigation. Mr. Gabbert's review of the entire record, including the second penalty trial, is in progress.

6. There are several potential mental health claims relating to the Thompson case. These include the defendant's mental state at the time of the offense, at the time of his statements to law enforcement officers, his competency to stand trial and substantial mitigating factors inexplicably not presented during the second penalty trial. While the investigation and presentation of mental health issues are regularly considered in any capital case, they are especially critical in Mr. Thompson's case given the peculiar circumstances of his personal history, and their possible effect on the voluntariness of his admissions and confession. It appears from my initial review of the record that Robert Thompson was a victim of severe child abuse. During his childhood, Thompson's father insisted that he consume alcohol with him, and then perform sexual

acts. Thompson's natural father appears to have been an alcoholic. Mr. Thompson suffered from the same affliction, and may have inherited a propensity to alcoholism. Perhaps as an outgrowth of this, Thompson has also experienced blackouts which may be an outgrowth of his alcoholism, or an indication of some form of organic brain injury.

7. In my opinion, an in-depth investigation is necessary to develop a reliable social and medical history of Mr. Thompson. This is the first step in obtaining a complete and competent mental health evaluation. WIthout a properly gathered, well-documented and complete social history, counsel will be unable to determine the extent and severity of mental dysfunctions that affected Thompson's behavior at the time of the offense, as well as at the time he made

statements to the police, and during his testimony at trial.

8. A thorough investigation necessarily involves: interviewing Thompson and others with knowledge of his history, and behavior surrounding the offense, and his trial; collecting essential life history documents such as school, medical, criminal history, institutional and employment records; obtaining appropriate records about other family members with mental disabilities or histories that may have affected Thompson's development, behavior and mental functioning. The trial lawyers' and defense investigator's files indicate that these reviews have not been done at all or not done in a complete manner.

9. An investigation should also be conducted into both trial counsel's conduct. Prior to defendant's re-trial, his first trial attorney asked to be

relieved, because of his intense dislike of the defendant. No basis for this statement appears in the record reviewed to date. An investigation should be conducted regarding any possible bias or conflicts in first trial counsel's own background which led him to become uncomfortable with handling a case of his nature. Second trial counsel appears to have been substantially less experienced. He did not present substantial mitigating evidence at the penalty trial that was presented at the first trial. The strategic and tactical basis for omitting information previously presented to the first penalty jury, who were unable to reach a verdict, also needs to be investigated.

10. Based on my experience investigating numerous capital cases, it is reasonable to anticipate the preparation and investigation into

Thompson's life history, and the events surrounding the offense and the subsequent trial will require approximately 300 hours of competent investigative time. My hourly rate for investigation is $60.00 an hour. This is in keeping with the reasonably market rate for this work in Southern California.

11. Once all of the potential issues, witnesses and documents have been identified, a comprehensive investigative plan will be formulated and presented to the Court (under seal) concurrently with Mr. Gabbert's application for my appointment. The results of the investigation will be relied upon by counsel and appropriate mental health professionals to determine Thompson's mental functioning. Evidence collected regarding the defense counsel and jury conduct will bear directly on issues to be raised in Mr. Thompson's federal habeas

corpus petition. To date, my review of trial counsel's files indicates that these necessary investigations have not been conducted on Thompson's behalf.

I declare under penalty of perjury that the foregoing is true and correct except as to those allegations made by me based on information and belief and I believe those allegations to be true.

Executed this 5th day of December, 1991, at Santa Monica, California.

/s/
KEITH ROHMAN

APPENDIX F

PAUL L. GABBERT, ESQ.
2115 Main Street
Santa Monica, CA 90405
213/399-3259

Attorney for Petitioner,
Robert Jackson Thompson

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT JACKSON THOMPSON, Petitioner, v. DANIEL VASQUEZ, as Warden of San Quentin State Prison, Respondent.	Case No. CV 90-6605-JMI ORDER GRANTING PETITIONER'S APPLICATION FOR AN EXTENSION OF THE TEMPORARY STAY TO PERMIT SUBMISSION OF AN APPLICATION FOR THE APPOINTMENT OF A DEFENSE INVESTIGATOR; FOR CO-COUNSEL, AND TO INVESTIGATE, PREPARE AND FILE A HABEAS CORPUS PETITION; ORDER SETTING BRIEFING SCHEDULE

GOOD CAUSE APPEARING THEREFORE,

IT IS HEREBY ORDERED:

Petitioner ROBERT JACKSON THOMPSON'S ("Petitioner") application for an order for extension of temporary stay to apply for the appointment of a Defense Investigator and for Co-Counsel to investigation and to assist in the preparation and filing of a habeas corpus petition is hereby GRANTED.

The Court sets forth the following briefing schedule, in accordance with Local Rules 26.8.7(c) and 26.8.8(c) and (d):

1. Petitioner is to submit any application for the appointment of a defense investigator to investigate all petitioner's exhausted and unexhausted state claims, his investigator's plan and for the appointment of co-counsel by January 15, 1992;

2. Petitioner's investigator shall complete his investigation of all

exhausted and unexhausted state claims by April 15, 1992;

3. The petition for writ of habeas corpus shall be filed by June 15, 1992;

4. Petitioner's temporary stay of execution is extended to and including July 1, 1992.

5. Respondent is to file an answer within thirty days from the date of service of the petition, in accordance with the Local Rules.

6. Petitioner is to file a traverse within thirty days after respondent has filed the answer, in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: December 16, 1991.

/s/
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

/s/
PAUL L. GABBERT
Attorney for Petitioner

Supreme Court, U.S.
FILED
OCT 26 1992
OFFICE OF THE CLERK

No. 91-1930

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Daniel Vasquez, Warden, and Daniel E. Lungren, Attorney General of the State of California, Petitioner

vs.

Robert J. Thompson, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Robert J. Thompson, asks leave to file the accompanying response to petition for writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Respondent has been granted leave to so proceed before the California Supreme Court. Respondent's affidavit in support of this motion is attached hereto.

Dated: October 23, 1992

Respectfully submitted,

Norma W. Mitchell

NORMA W. MITCHELL
Counsel for Respondent

28 pp

No. 91-1930

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Daniel Vasquez, Warden, and Daniel E. Lungren, Attorney General of the State of California, Petitioner

vs.

Robert J. Thompson, Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Robert J. Thompson, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes_____ No_____

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

---

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

1981

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes ✓ No ____

a. if the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

gift from parents

3. Do you own any cash or checking or savings account (include any funds in prison accounts)? Yes ✓ No ____

a. If the answer is yes, state the total value of the items owned.

$264.74

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No ✓

a. If the answer is yes, describe the property and state its approximate value.

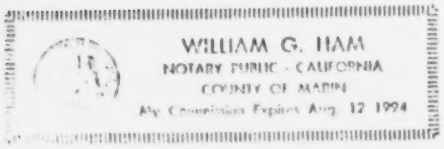
5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Robert J. Thompson
ROBERT J. THOMPSON

SUBSCRIBED AND SWORN TO before me this 11 day of September, 1992.



William G Ham
NOTARY PUBLIC

CERTIFICATE

I hereby certify that the respondent Robert J. Thompson has the sum of $264.74 on account to his credit at San Quentin where he is confined. I further certify that respondent likewise has the following securities to his credit according to the records of said institution:

N/A B

Dated: 9-11-92

William G Ham ca tt
Authorized Officer of San Quentin State Prison

No. 91-1930

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DANIEL VASQUEZ, Warden, and DANIEL E. LUNGREN, Attorney General of the State of California,
Petitioner,

v.

ROBERT J. THOMPSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL L. GABBERT
2115 Main St.
Santa Monica, California 90401
Telephone: (310) 399-3259

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Attorneys for Respondent

QUESTION PRESENTED

1. Does a United States District Court have jurisdiction under the All Writs Act (28 U.S.C. § 1651(a)) and/or under 28 U.S.C. § 2251 to temporarily stay the execution of a state prisoner who is entitled to the appointment of counsel in federal habeas corpus proceedings pursuant to 18 U.S.C. § 3006 A(a)(2)(B) and 21 U.S.C. § 848(q)(4)(b) and who has filed an application for the appointment of counsel to assist him in preparing and filing his first federal habeas corpus petition?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ADDITIONAL STATUTORY AND LOCAL RULES INVOLVED 1

STATEMENT OF THE CASE 4

ARGUMENT 4

INTRODUCTION 6

I. THE PROCEDURAL POSTURE OF THIS CASE DOES NOT IMPLICATE THE ISSUES RESPONDENT ASSERTS AS JUSTIFYING A GRANT OF CERTIORARI 7

II. THE ALL WRITS ACT PROVIDED THE AUTHORITY FOR THE DISTRICT COURT, PURSUANT TO THE LOCAL RULES, TO PRESERVE ITS JURISDICTION IN RESPONDENT'S CASE 9

III. THE DECISION OF THE COURT OF APPEALS IS BASED ON A NARROW READING OF APPLICABLE STATUTES AND DOES NOT PRESENT THE BROAD ISSUE RAISED BY PETITIONER 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES	PAGE
Adams v. United States ex rel. McCann, 317 U.S. 269 (1942)	12
Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964)	14
Application of United States of America For an Order Authorizing an In-Progress Trace of Wire Communications Over Telephone Facilities, 616 F.2d 1122 (9th Cir. 1980)	17
Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991)	6, 15-17
California v. Velasquez, 445 U.S. 1301 (1980)	13
Demosthenes v. Baal, 495 U.S. 731 (1990)	17
Edwards v. New York, 76 S. Ct. 538 (1956)	13
FTC v. Dean Foods Co., 384 U.S. 597 (1965)	12-14, 17
I.T.T. Community Dev. Corp. v. Barton, 569 F.2d 1351 (5th Cir. 1978)	12
In re Blodgett, 112 S. Ct. 674 (1992)	17
McCleskey v. Zant, 111 S. Ct. 1454 (1991)	11
Modesto v. Nelson, 296 F. Supp. 1375 (N.D.C.A. 1969)	17
Moorer v. State of South Carolina, 240 F. Supp. 529 (E.D.S.C. 1964)	17
People v. Price, 1 Cal. 4th 324 (1991)	11
Reese v. Teets, 248 F.2d 147 (9th Cir. 1957)	17
Smith v. Lamontrout, 825 F.2d [illegible] (8th Cir. 1987)	17

United Sates v. Shipp,
203 U.S. 563 (1906) 13

United States ex rel. La Marca v. Denno,
159 F. Supp. 486 (S.D.N.Y. 1958) 17

STATUTES

18 U.S.C. Section 3006A(a)(2)(b)	i
21 U.S.C. Section 848, subdivision (q)(4)(b)	i, 16
28 U.S.C. § 2251	i, 16
All Writs Act (28 U.S.C. §1651(a))	i, 1, 9, 10, 12-14
California Penal Code § 1227	3, 11
Local Civil Rule 26.8.7(a)	10
Local Civil Rule 26.8.4(a)(iv)	2, 5
Local Civil Rule 26.8.7(c)	2, 5, 7, 9-11

No. 91-1930

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DANIEL VASQUEZ, Warden, and DANIEL E. LUNGREN, Attorney General of the State of California,
Petitioner,

v.

ROBERT J. THOMPSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Robert J. Thompson (Thompson), hereby responds to the Petition for Writ of Certiorari (the Petition) filed by petitioners Daniel Vasquez, Warden, State Prison at San Quentin, California, and Daniel E. Lungren, Attorney General of the State of California (the State), seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, issued March 12, 1992, an unpublished memorandum opinion.

ADDITIONAL STATUTORY AND LOCAL RULES INVOLVED

28 U.S.C. § 1651(a), The All Writs Act, provides: "The Supreme Court and all courts established by act of congress may issue all writs necessary or appropriate in aid of their

respective jurisdictions and agreeable to the usages and principles of law."

Local Civil Rule 26.8.7(c) of the United States District Court for the Central District of California states: "Temporary stay for Preparation of the Petition: Where counsel new to the case is appointed, upon counsel's application for temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition. The temporary stay may be extended by the court upon a subsequent showing of good cause."

Local Civil Rule 26.8.4(a)(iv) of the United States District Court for the Central District of California states: "If state appellate counsel is not available to represent petitioner on federal habeas corpus or if appointment of state appellate counsel would be inappropriate for any reason, the court shall appoint counsel upon application of petitioner. The Clerk of Court shall have available forms for such application. Counsel shall be appointed from the panel of qualified attorneys certified by the selection board. Either California Appellate Project or the selection board may suggest one or more counsel for appointment. The court may also request suggestion of one or more counsel from California Appellate Project or the selection

board. If application for appointed counsel is made before a petition has been filed, the application shall be assigned to a district judge. The judge so assigned shall be the judge assigned when counsel files a petition for writ of habeas corpus."

California Penal Code section 1227 states: "If for any reason other than the pendency of an appeal pursuant to subdivision (b) of Section 1239 of this code a judgment of death has not been executed, and it remains in force, the court in which the conviction was had shall, on application of the district attorney, or may upon its own motion, make and cause to be entered an order appointing a day upon which the judgment shall be executed, which must not be less than 30 days nor more than 60 days from the time of making such order; and immediately thereafter, a certified copy of such order, attested by the clerk, under the seal of the court, shall, for the purpose of execution, be transmitted by registered mail to the warden of the state prison having the custody of the defendant; provided, that if the defendant be at large, a warrant for his apprehension may be issued, and upon being apprehended, he shall be brought before the court, whereupon the court shall make an order directing the warden of the state prison to whom the sheriff is instructed to deliver the defendant to execute the judgment at a specified time, which shall not be less than 30 days nor more than 60 days from the time of making such order.

"From an order fixing the time for and directing the execution of such judgment as herein provided, there shall be no appeal."

STATEMENT OF THE CASE

Respondent Thompson was convicted of first-degree murder under special circumstances in California state court and was sentenced to death. The conviction and sentence were affirmed on appeal. People v. Thompson 50 Cal. 3d 134, 785 P.2d 857, (1990), cert. denied, 111 S. Ct. 226 (1990).

On October 30, 1990, the Orange County Superior Court filed a Warrant of Execution ordering Respondent to be put to death at San Quentin prison on December 28, 1990.

On December 5, 1990, acting pro se, Thompson filed a "Request for Appointment of Counsel in Death Sentence Case and for Stay of Execution of Death Sentence." Thompson's request for stay was accompanied by his declaration stating "I intend to file a petition for writ of habeas corpus in this court, alleging federal constitutional errors which entitle me to relief from the judgment of death." Thompson also stated that he was under imminent sentence of death; that the attorney who represented him in state court was unavailable to represent him in his federal habeas proceeding; that he was indigent and requested the appointment of an attorney to represent him "in death penalty habeas corpus litigation" in the federal courts.

Because the selection board of the Central District of California, California Appellate Project, had difficulty securing

qualified counsel, two extensions of the stay order were requested pursuant to Central District Rule 26.8.4(a)(iv). These requests were granted by the district court, extending the stay order to March 21, 1991.

Shortly thereafter, the petitioner moved to vacate the stay of execution and, in the alternative, objected to any further stays. In this motion, petitioner contended that the district court lacked jurisdiction to issue a stay because no petition for writ of habeas corpus had been filed.

On March 21, 1991, the court appointed counsel to represent Thompson. That counsel, in conformity with Local Rule 26.8.7(c), filed Thompson's specification of nonfrivolous issues and also applied for a 120-day stay. On the same date, the 120-day stay was granted "to permit the preparation of a habeas corpus petition by petitioner's newly appointed counsel." Order Staying Execution of 03/21/91, at 1.

On March 28, 1991, the district court filed its opinion denying petitioner's motion to vacate the stay. Petitioner appealed to the Ninth Circuit, which heard the matter on March 6, 1992. On March 12, 1992, the Ninth Circuit affirmed the district court judgment.

ARGUMENT

THE UNITED STATES DISTRICT COURT CORRECTLY EXERCISED ITS JURISDICTION PURSUANT TO STATUTORY AUTHORITY AND LOCAL COURT RULES TO TEMPORARILY STAY THE EXECUTION OF A CONDEMNED PRISONER WHO HAD REQUESTED THE ASSISTANCE OF COUNSEL TO WHICH HE WAS ENTITLED IN PREPARING HIS FIRST FEDERAL HABEAS CORPUS PETITION

INTRODUCTION

The narrow issue appealed to and decided by the court of appeals in this case and Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991), was whether an indigent death-sentenced prisoner's filing of an application for the appointment of counsel to assist him in preparing his first federal habeas corpus petition constituted an invocation of habeas corpus proceedings conferring jurisdiction on the district court to issue a temporary stay of execution. By contrast, petitioner seeks review of broader issues that were not before the court of appeals -- nor susceptible of informed resolution on the current record -- regarding the district court's exercise of discretion to permit counsel the time reasonably necessary to prepare a finished petition.

Petitioner's discussion of the issue presented does not accurately describe the significant facts and procedural history that justified the lower courts' rulings, the provisions of the local rules under which the district court issued a stay of execution, nor the legal basis for the court of appeals' holding. When these factors are correctly understood, it is evident that the rulings of the district court and the Ninth Circuit are wholly consistent with settled law governing the exercise of

habeas corpus jurisdiction and vindicate Congress's intent to provide counsel to indigent prisoners in federal capital habeas corpus proceedings. In addition, petitioner has failed to demonstrate that any of the traditional bases for invoking this court's limited resources -- to resolve a conflict among the circuits and to resolve an issue of national importance -- is present here. Nor could petitioner. The order from which petitioner appealed and the local rules that guided the issuance of the order do not conflict with any authority.

I

THE PROCEDURAL POSTURE OF THIS CASE DOES NOT IMPLICATE THE ISSUES RESPONDENT ASSERTS AS JUSTIFYING A GRANT OF CERTIORARI

As framed by petitioner, the question presented is whether the district court may stay execution of a state death judgment when the prisoner "has never filed a petition for writ of habeas corpus or anything that could reasonably be construed as a petition." Petition at i (emphasis added). The order from which petitioner appealed to the Ninth Circuit imposed only a temporary stay of execution to appoint counsel. Yet, petitioner's discussion of the consequences that warrant a grant of certiorari -- i.e., additional stays to permit appointed counsel a reasonable opportunity to prepare the petition -- concern events that may occur under the local rules only if newly appointed counsel files a formal specification of nonfrivolous claims in support of a request for additional time to prepare the

petition. C.D. Cal. Local Rule 26.8.7(c).[1] Contrary to petitioner's suggestion, petitioner did not raise, and the court of appeals did not decide, whether filing a formal specification of constitutional violations constituted the functional equivalent of filing a petition "seeking relief" under section 2254. See Petition at 38. Equally important, petitioner has never explained to the district court why counsel's specification of issues is insufficient to invoke the district court's habeas corpus jurisdiction, or what else the district court should have required -- such as having the prisoner sign the specification of issues -- in order to consider the document the functional equivalent of a petition.

Although cast as an attack on the district court's authority to stay an execution to appoint counsel, petitioner's real complaint is with the amount of time the district court reasonably may give appointed counsel to complete his or her work. Because petitioner did not raise this issue below, it did not give the district court or respondent an opportunity to correct what petitioner itself may regard as merely technical objections to the district court's exercise of jurisdiction.[2]

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[1] Indeed, petitioner does not explain whether any of the cases listed in Appendix D is one in which counsel had yet to be appointed at the time the petition for writ of certiorari was filed. The purportedly significant dates provided by petitioner are those only for the initial stay and the date the habeas petition, if filed, was filed.

[2] Petitioner has no objection to the district court exercising habeas corpus jurisdiction if the prisoner signs a preprinted federal habeas corpus form supplemented by a photocopy of "the table of contents" of the state court pleadings.

Clearly, such technical objections still can be resolved and easily rendered moot if petitioner presents them to the district court. Thus, even under petitioner's view, any remaining questions regarding the exercise of the district court's discretion to permit counsel to amend the petition then would be unlikely to raise issues worthy of a grant of certiorari.

In any event, because the Ninth Circuit affirmed only the district court's authority to temporarily stay respondent's execution to permit the appointment of counsel, the question of what additional pleadings were necessary to permit counsel a reasonable opportunity to prepare a final petition cannot properly be raised at this juncture.

II

THE ALL WRITS ACT PROVIDED THE AUTHORITY FOR THE DISTRICT COURT, PURSUANT TO THE LOCAL RULES, TO PRESERVE ITS JURISDICTION IN RESPONDENT'S CASE

By overlooking the provisions of Local Rule 26.8.7(c) petitioner also overstates the issue by suggesting that the Local Rules of the Central District of California authorize the

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Petition at 35-36. "[S]uch a proper petition" would permit the district court to both appoint counsel and permit counsel the opportunity to "more fully present" the prisoner's claims. Id. at 36. The substance of such a document, however, would unquestionably be of less value than the specification of issues, prepared by counsel, in enabling the district court to determine whether there are potentially colorable grounds for relief. The only other difference between the two documents is that the type favored by petitioner is signed by the prisoner and the one contemplated by the local rules is signed by counsel. Presumably, petitioner thus would have had no objection to the district court continuing to exercise habeas corpus jurisdiction if respondent also signed the document prepared by appointed counsel. This is not a difference that warrants a grant of certiorari.

district court to issue a temporary stay of execution when any state prisoner sentenced to death applies for the appointment of counsel and that the rules raise the prospect of "hundreds of stay orders" being issued "in the total absence of any colorable showing of a constitutional violation . . . ." Petition at 20-21 (emphasis added). The suggestions are meritless, and an examination of the Rules' provisions demonstrate that they contemplate an appropriate exercise of the district court's jurisdiction under the All Writs Act. See 28 U.S.C. § 1651(a).

Local Rule 26.8.7 provides for a temporary stay only in those cases in which the attorney who represented a death-sentenced prisoner in state court is unavailable to go forward in federal habeas corpus proceedings. In those cases in which the prisoner seeks federal court appointment of the same attorney who represented him in state proceedings, the local rules provide for issuance of a stay of execution only upon the filing of the habeas corpus petition. Local Rule 26.8.7(a). Thus, the provisions of the Local Rule providing for a "new counsel" stay are invoked only when it is necessary to prevent the prisoner from being executed before the district court can find counsel to represent him.

Similarly, as discussed above -- and contrary to petitioner's suggestion -- once new counsel is appointed, any further stay to allow counsel to become familiar with the record and prepare a habeas petition requires that counsel first file a specification of nonfrivolous issues to be raised in the

petition. Local Rule 26.8.7(c). The district court is thereby assured that the existence of potentially meritorious habeas corpus claims justify counsel's request to become familiar with the state court record.[3] At the very least, there can be no rational fear that the district courts will grant temporary stays "in the total absence of any colorable showing" of constitutional violations.

In a jurisdiction such as California where state court records may exceed 40,000 pages of transcripts, see, e.g., People v. Price, 1 Cal. 4th 324, 376 n.1 (1991), and the prisoner may be executed within 30 to 60 days of a noticed hearing to set an execution date, California Penal Code § 1227, a stay to permit new counsel to review the record is essential to affording a prisoner the assistance of counsel in preparing a first habeas corpus petition.[4]

The information provided to the district court by way of the application for counsel and the specification of issues

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[3] The necessity to specify such claims also rebuts petitioner's suggestion that absent a petition "there is no way for a district court to ascertain if any of the potential, but as yet unraised, claims have been exhausted in state courts." Petition at 30-31 (emphasis added).

[4] Such stays also are crucial to the district court's ability to appoint qualified counsel, particularly in light of the Court's announcement of the abuse of the writ doctrine in McCleskey v. Zant, 111 S. Ct. 1454 (1991). McCleskey requires a prisoner to assert all available constitutional claims in his initial habeas corpus petition or risk losing potentially viable claims. Qualified attorneys are unlikely to accept the awesome responsibility of federal habeas corpus representation if they are not given the time necessary to prepare a petition raising all reasonably available claims.

provides the court at either juncture with justification for exercising its authority under the All Writs Act to preserve its future jurisdiction. The All Writs Act invests a federal court with the power . . . to issue injunctive orders in a case even before the court's jurisdiction has been established. When potential jurisdiction exists, a federal court may issue status quo orders to insure that once its jurisdiction is shown to exist, the court will be in a position to exercise it." I.T.T. Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 n.19 (5th Cir. 1978) (citing FTC v. Dean Foods Co., 384 U.S. 597, 603-05 (1966) [on application of federal regulatory agency, appellate court's power to enter a status quo injunction "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may later be perfected." 384 U.S. at 603 (emphasis added)]). This Court's well established case law regarding the scope of the All Writs Act recognizes that "[p]rocedural instruments are means for achieving the rational ends of law . . . . Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound discretion to achieve the ends of justice entrusted to it." Adams v. United States ex rel. McCann, 317 U.S. 269, 272-73 (1942).

This jurisdiction-preserving power consistently has been invoked to stay the execution of state prisoners who may be eligible for federal relief, regardless of whether they have

filed a formal petition or validly invoked the court's jurisdiction to provide final relief. See, e.g., Edwards v. New York, 76 S. Ct. 538 (1956) (Harlan, J., in chambers) (despite "grave doubts, to say the least" as to the presence of a substantial federal question, "this being a capital case I am constrained to give petitioner a reasonable opportunity to petition for a writ of certiorari"); United States v. Shipp, 203 U.S. 563, 573 (1906) (Holmes, J.) (even had federal habeas jurisdiction been absent, federal stay of execution was proper, as was contempt prosecution arising from lynching of habeas petitioner during stay; stay was necessary for federal court to determine its own jurisdiction over action). Indeed, the Attorney General of California invoked a form of this jurisdiction-preserving power in California v. Velasquez, 445 U.S. 1301 (1980) (Rehnquist, J., in chambers), obtaining a stay of proceedings before filing a petition for certiorari -- following the California Supreme Court's reversal of the respondent's sentence of death.

In FTC v. Dean Foods Co., 384 U.S. 597 (1965), this Court made unmistakably clear that a federal court may act under the All Writs Act to preserve its future federal jurisdiction over a matter committed to it by statute. In Dean Foods, the court of appeals enjoined a company's merger and dissolution to preserve the court's future jurisdiction under the Administrative Procedures Act. Pursuant to the Administrative Procedure Act, the court of appeals has original jurisdiction to review final

orders of federal administrative agencies. Although this regulatory matter was still pending before an administrative agency, and no federal court action had been formally initiated, the court of appeals was nevertheless permitted, under the All Writs Act, to stay the dissolution of the company pending invocation of the court's jurisdiction under the Administrative Procedures Act. Dean Foods, 384 U.S. at 603-05.

The All Writs Act is particularly appropriate here. Respondent's death would literally terminate the court's subject matter jurisdiction. Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964). Respondent's death is, of course, petitioner's goal. In Application of President, the judge, pursuant to the All Writs Act, issued an order permitting nonconsensual blood transfusions; "[b]ecause of the demonstrated imminence of death from loss of blood, signing the order was necessary to maintain the status quo and prevent the issue respecting the rights of the parties . . . from becoming moot before full consideration was possible." Id. at 1007. Recognizing that federal jurisdiction does not depend on a comprehensive initial pleading, the court explicitly noted and excused defects in the form of the papers filed. Id. at 1001 n.2.

Accordingly, when an unrepresented prisoner facing execution seeks the assistance of counsel to which he is statutorily entitled in order to prepare his first habeas corpus petition, the All Writs Act empowers the district court to

temporarily stay the prisoner's execution to appoint counsel. When, as contemplated by the local rules, appointed counsel then apprises the court of the existence of potential, colorable claims for relief, the court also is authorized to stay the prisoner's execution at least for the time reasonably necessary to permit counsel to render the assistance he or she was appointed to render. A contrary result would preempt the prisoner's right to federal court consideration of important constitutional claims and frustrate the will of Congress in providing a statutory right to counsel in such cases.

III

THE DECISION OF THE COURT OF APPEALS IS BASED ON A NARROW READING OF APPLICABLE STATUTES AND DOES NOT PRESENT THE BROAD ISSUE RAISED BY PETITIONER

Even if petitioner had limited its petition to the issue actually considered by the Ninth Circuit, petitioner has overstated the basis for the circuit's decision in Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991). Petitioner describes Brown as holding:

> [A] federal district court has the inherent power to stay the execution of a state death sentence even though the prisoner has not filed a petition for habeas corpus but has only filed a request for counsel.

Petition at 17 (emphasis added). Because no such "inherent power" exists, petitioner argues, this "Court should grant certiorari to instruct the lower federal courts on the limits of their jurisdiction to grant a stay of execution . . . ." Id. at 18. A plain reading of Brown, however, reveals the decision to be firmly based on the federal courts' statutory power that is

conferred pursuant to 28 U.S.C. § 2251 to a district court judge "before whom a habeas corpus proceeding is pending . . . ." Brown v. Vasquez, 952 F.2d at 1169.

As construed by the Brown court, a "proceeding is pending" within the meaning of section 2251 once a condemned prisoner files his application for the appointment of counsel to assist with the preparation of a habeas corpus petition. The Brown court reasoned that the purpose for appointing counsel in habeas corpus was to assist both the court and the petitioner by insuring that the finished petition complied with the often complex requirements of habeas corpus jurisprudence. Brown concluded that the district court's statutory power to appoint counsel to represent a habeas petitioner,[5] includes the authority to "issue a stay of execution when necessary to make the appointment and to allow appointed counsel reasonable time to do his job." Id. at 1169. A contrary interpretation of the statute would risk the "perverse absurdity" of permitting the prisoner to be executed "before the appointed counsel could be found or before that counsel could undertake the task for which he was appointed." Id.

Thus, contrary to petitioner's suggestion, neither the district court nor the court of appeals has attempted to arrogate onto themselves jurisdiction that was not otherwise conferred by

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[5] Indeed, 21 U.S.C. section 848, subdivision (q)(4)(b) mandates the appointment of counsel in death penalty habeas corpus cases.

Congress. Accordingly, a grant of certiorari is unnecessary to "instruct" either court as to the limits of its jurisdiction.[6]

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[6] Moreover, the court of appeals's statutory interpretation -- that the application for appointment of counsel is an integral part of the habeas process sufficient to initiate "proceedings" under section 2251 -- creates no issue worthy of granting certiorari. Petitioner has pointed to no conflicting authority. Demosthenes v. Baal, 495 U.S. 731 (1990) is a standing case, not a jurisdiction case. The only holding in Demosthenes is that those who sought to assert the rights of the petitioner in that case did not have standing to do so. In re Blodgett, 112 S. Ct. 674 (1992) has nothing to do with the question of jurisdiction raised here. In Blodgett, the Court denied a petition for writ of mandamus directing the court of appeals to issue its decision on a two-year old appeal from the denial of a second federal habeas corpus petition. Id. at 675. Blodgett stands for the proposition that a court of appeals has a duty to, without delay, consider claims raised in appeals from denial of successive habeas petitions. Id. at 676. In marked contrast, this case does not involve successive petitions. The other cases petitioners cites in "support" of its argument are habeas proceedings wherein the question raised in Brown and the instant case did not arise since petitions had been filed. See Smith v. Armontrout, 825 F.2d 182 (8th Cir. 1987); Reese v. Teets, 248 F.2d 147 (9th Cir. 1957); Modesto v. Nelson, 296 F. Supp. 1375 (N.D. Cal. 1969); Moorer v. State of South Carolina, 240 F. Supp. 529 (E.D.S.C. 1964); United States ex rel. La Marca v. Denno, 159 F. Supp. 486 (S.D.N.Y. 1958). None of the cases cited by petitioner required the filing of a habeas petition for the exercise of jurisdiction, and all are in harmony with the holding in Brown and the instant case.

Similarly, even if the application for appointment of counsel is not sufficient to create a habeas corpus "proceeding," it is clearly adequate, as discussed above, to apprise the district court of its potential jurisdiction in the matter and justify issuance of an injunctive order under the All Writs Act to preserve such jurisdiction. See FTC v. Dean Foods Co., 384 U.S. at 603-05; Application of United States of America For an Order Authorizing an In-Progress Trace of Wire Communications Over Telephone Facilities, 616 F.2d 1122, 1129 (9th Cir. 1980).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 25, 1992

(2)

No. 91-1930

MOTION FILED
OCT 22 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL VASQUEZ,
Warden, San Quentin State Prison,

Petitioner,

vs.

ROBERT JACKSON THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a federal district court have jurisdiction to stay the execution of a state death penalty judgment prior to the filling of a habeas corpus petition?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL VASQUEZ,
Warden, San Quentin State Prison,

Petitioner,

vs.

ROBERT JACKSON THOMPSON,

Respondent.

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that the Anti-Injunction Act prohibits stays of execution of state criminal judgments except as authorized by 28 U. S. C. § 2251. That section only authorizes a stay when habeas corpus proceedings are "pending." Proceedings are pending only after the petition is filed.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate

in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The federal district courts in California have needlessly delayed enforcement of the state's death penalty, reducing its deterrent effect. The pre-filing stay of execution is one tool that the district courts have used for the inexcusable delays. See App. Pet. Cert., Appendix D. Those delays are contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

October, 1992

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

TABLE OF CONTENTS

Question presented i

Motion for leave to file iii

Table of authorities vii

Brief amicus curiae 1

Summary of facts and case 1

Summary of argument 2

Argument 2

I

Section 2251 is the sole authority for staying a state execution 3

A. The Anti-Injunction Act 3

B. The All-Writs Act 7

1. *Dean Foods* 7

2. Supreme Court stays 8

II

The application for stay and counsel cannot be "deemed" to be a petition 10

III

A proceeding is "pending" under § 2251 when the petition is filed and not before 13

A. Civil cases generally 14

B. Habeas corpus cases 15

IV

Practical alternatives exist 18

V

Demosthenes v. *Baal* accurately summarizes the controlling principles 20

Conclusion 20

TABLE OF AUTHORITIES

Cases

Amalgamated Clothing Workers of America v. Richman Bros., 348 U. S. 511, 99 L. Ed. 600, 75 S. Ct. 452 (1955) 4

Antone v. Dugger, 465 U. S. 200, 79 L. Ed. 2d 147, 104 S. Ct. 962 (1984) 19

Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U. S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970) 4, 9, 18

Baldwin County Welcome Center v. Brown, 466 U. S. 147, 80 L. Ed. 2d 196, 104 S. Ct. 1723 (1984) 10, 11, 15, 19

Barefoot v. Estelle, 463 U. S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983) 13, 15, 17

Bounds v. Smith, 430 U. S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977) 15, 16

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953) 12

Brown v. Vasquez, 743 F. Supp. 729 (C.D. Cal. 1990) 2, 3, 5, 8, 15

Brown v. Vasquez, 952 F. 2d 1164 (CA9 1991) 2, 3, 16, 18, 19

Coleman v. Thompson, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) 18

Continental Illinois National Bank v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595 (1935) 8

Demosthenes v. Baal, 495 U. S. 731, 109 L. Ed. 2d 762, 110 S. Ct. 2223 (1990) 7, 13, 20

Estelle v. McGuire, 116 L. Ed. 2d 385,
112 S. Ct. 475 (1991) 15, 17

Ex parte Kearney, 7 Wheat. (20 U. S.) 38,
5 L. Ed. 391 (1822) 18

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837,
83 S. Ct. 822 (1963) 18

Frazier v. Heebe, 482 U. S. 641, 96 L. Ed. 2d 557,
107 S. Ct. 2607 (1987) 13

FTC v. Dean Foods Co., 384 U. S. 597,
16 L. Ed. 2d 802, 86 S. Ct. 1738 (1966) 7, 8

Hallstrom v. Tillamook County, 493 U. S. 20,
107 L. Ed. 2d 237, 110 S. Ct. 304 (1989) 13

Hill v. Lockhart, 474 U. S. 52, 88 L. Ed. 2d 203,
106 S. Ct. 366 (1985) 13

Hill v. Martin, 296 U. S. 393, 80 L. Ed. 293,
56 S. Ct. 278 (1935) 4

Holiday v. Johnston, 313 U. S. 342, 85 L. Ed. 1392,
61 S. Ct. 1015 (1941) 12

Horton v. California, 496 U. S. 128, 110 L. Ed. 2d 112,
110 S. Ct. 2301 (1990) 7

In re Blodgett, 116 L. Ed. 2d 669,
112 S. Ct. 674 (1992) 17

In re Connaway, 178 U. S. 421, 44 L. Ed. 1134,
20 S. Ct. 951 (1900) 14, 15

Juidice v. Vail, 430 U. S. 327, 51 L. Ed. 2d 376,
97 S. Ct. 1211 (1977) 4

Kline v. Burke Construction Co., 260 U. S. 226,
67 L. Ed. 226, 43 S. Ct. 79 (1922) 5, 8

Lewis v. Jeffers, 111 L. Ed. 2d 606,
110 S. Ct. 3092 (1990) 15, 17

Looney v. Eastern Texas R. Co., 247 U. S. 214,
62 L. Ed. 1084, 38 S. Ct. 460 (1918) 5

McCleskey v. Zant, 113 L. Ed. 2d 517,
111 S. Ct. 1454 (1991) 19

Parsons Steel, Inc. v. First Alabama Bank,
474 U. S. 518, 88 L. Ed. 2d 877,
106 S. Ct. 768 (1986) 5

People v. Gonzalez, 51 Cal. 3d 1179, 276 Cal. Rptr. 62,
800 P. 2d 1159 (1990) 18

People v. Thompson, 50 Cal. 3d 134, 266 Cal. Rptr. 309,
785 P. 2d 857 (1990) 1

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 19

Ross v. Moffitt, 417 U. S. 600, 41 L. Ed. 2d 341,
94 S. Ct. 2437 (1974) 16

Southern R. Co. v. Painter, 314 U. S. 155,
86 L. Ed. 116, 62 S. Ct. 154 (1941) 5

Studebaker Corp. v. Gittlin, 360 F. 2d 692
(CA2 1966) 10

Sumner v. Mata, 455 U. S. 591, 71 L. Ed. 2d 480,
102 S. Ct. 1303 (1982) 15

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 17

Toucey v. New York Life Ins. Co., 314 U. S. 118,
86 L. Ed. 100, 62 S. Ct. 139 (1941) 5

Vendo Co. v. Lektro-Vend Corp., 433 U. S. 623,
53 L. Ed. 2d 1009, 97 S. Ct. 2881 (1977) 6

Whitmore v. Arkansas, 495 U. S. 149,
109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990) 12

Whitney Nat. Bank v. Bank of New Orleans & Trust Co., 379 U. S. 411, 13 L. Ed. 2d 386, 85 S. Ct. 551 (1965) 8

Younger v. Harris, 401 U. S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) 4, 7

United States Statutes

18 U. S. C. § 3006A(a)(2) 19

28 U. S. C. § 1257 8

28 U. S. C. § 1651(a) 3, 7

28 U. S. C. § 2101(f) 9

28 U. S. C. § 2241 11

28 U. S. C. § 2242 12

28 U. S. C. § 2243 17

28 U. S. C. § 2251 . . . . . 2, 3, 5, 19

28 U. S. C. § 2283 3

42 U. S. C. § 2000e-5(f)(1) 19

Pub. L. No. 80-773, 62 Stat. 961-962, 966 (1948) 9

Pub. L. No. 94-426 § 1, 90 Stat. 1334 (1976) 11

California Statutes

Cal. Penal Code § 1193 18

Cal. Penal Code § 1239(b) 16

Federal Rules of Court

Federal Rules of Civil Procedure, Rule 3 . . . . . 10, 16

Rule 8 . . . 10, 11, 12

Rule 11 12

Rules Governing Section 2254 Cases in the United States District Courts, Rule 2 . . . . . 11, 12

Rule 4 17

Rule 11 16

Rules of the Supreme Court, Rule 13.1 18

California Rules of Court

Supreme Court Policies Regarding Cases Arising from Judgments of Death, Deering's Cal. Codes, 2 Rules of Court 262-265 (1992 Supp.) 16, 18

Treatises

J. Liebman, *Federal Habeas Corpus Practice and Procedure* (1988) 12, 13, 14

J. Moore & J. Lucas, *Moore's Federal Practice* (2nd ed. 1991) 14

Miscellaneous

Advisory Committee Note to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts 12, 17

L. Powell, et al., Ad Hoc Committee on Federal Habeas Corpus in Capital Cases: Committee Report and Proposal (1989) 17, 19

Revision Note to 28 U. S. C. § 2283 . . . . . 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL VASQUEZ,
Warden, San Quentin State Prison,

Petitioner,

vs.

ROBERT JACKSON THOMPSON,

Respondent.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

On August 25, 1981, Robert Thompson forcibly sodomized and strangled Benjamin Brenneman, a 12-year-old newspaper carrier. *People* v. *Thompson*, 50 Cal.3d 134, 148, 785 P. 2d 857 (1990). Thompson was convicted of the murder and sentenced to death. On February 8, 1990, the California Supreme Court unanimously affirmed the conviction and sentence. *Id.*, at 187-188. On March 29, 1990, the California Supreme Court denied his petition for rehearing in an unpublished order.

On October 1, 1990, this Court denied Thompson's certiorari petition. On October 30, 1990, the Orange County Superior Court set an execution date of December 28, 1990.

On December 5, 1990, Thompson filed in federal district court a request for counsel and a stay of execution.

The request stated that he intended to file a habeas corpus petition with the District Court that would raise constitutional errors. The District Court issued a 45-day stay. The District Court granted two 30-day extensions of the stay, and on March 21, 1991, appointed counsel for Thompson. On March 28, 1991, the District Court denied the Attorney General's motion to vacate the stay of execution. The Ninth Circuit affirmed the District Court in an unpublished memorandum opinion, citing its decision in *Brown* v. *Vasquez*. The Attorney General has filed a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Anti-Injunction Act is a strict prohibition of federal interference with state court proceedings, subject only to a few narrowly construed exceptions. No exception other than 28 U. S. C. § 2251 applies to habeas corpus.

A case is not "pending" within the meaning of section 2251 until a petition is filed. A document which does not meet the minimal showing required by statute and rule cannot be "deemed" to be a petition.

Although not essential to a jurisdictional analysis, it is worth noting that practical alternatives to pre-filing stays exist. Potential petitioners can apply for counsel immediately upon exhaustion of state remedies. Prompt application will provide counsel sufficient time to place all exhausted claims in petition form and obtain a stay.

ARGUMENT

In the case below the Ninth Circuit relied upon its prior decision in *Brown* v. *Vasquez*, 952 F. 2d 1164 (1991) to uphold pre-habeas stays of execution. Therefore, this decision and the District Court's decision in the same case, see *Brown* v. *Vasquez*, 743 F. Supp. 729 (1990), will be the focus of the analysis. This Court's denial of certiorari in *Brown* should not preclude certiorari for the

present case. Brown had filed a habeas petition before the Ninth Circuit affirmed the stay, raising a mootness question. The present case does not have this problem, as Thompson has not yet filed a habeas petition.

In *Brown*, the District Court found that it had authority to issue a stay independently of the habeas stay provision, 28 U. S. C. § 2251, basing its decision on the All-Writs Act, 28 U. S. C. § 1651(a). *Brown* v. *Vasquez*, 743 F. Supp. 729, 731 (C.D. Cal. 1990). The District Court did not even mention the Anti-Injunction Act, 28 U. S. C. § 2283.[1]

Apparently recognizing the flaw in the District Court's position, the Court of Appeals in *Brown* instead construed section 2251 to authorize a stay before a petition is filed. The Court of Appeals notes, correctly, that section 2251 is an exception to the Anti-Injunction Act. 952 F. 2d, at 1169. Neither the state nor *amicus* says that it is not. The sole question on this approach is whether section 2251 applies prior to the filing of a petition.

Part I of this brief addresses the theory that power to stay exists independently of section 2251. Part II examines the contention that papers filed prior to the actual petition can be "deemed" to be a petition for the purpose of issuing a stay. Part III examines the *Brown* court's theory that section 2251 authorizes pre-filing stays.

I. Section 2251 is the sole authority for staying a state execution.

A. The Anti-Injunction Act.

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U. S. C. § 2283. Execution of judgment

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1. In the present case, Thompson made a similar argument to the Ninth Circuit. See Appellee's Brief at 6-25.

is a state court proceeding within the meaning of this section. *Hill* v. *Martin*, 296 U. S. 393, 403 (1935).[2]

This Congressional command is fundamentally different from judicially created doctrines of abstention, such as *Younger* v. *Harris*, 401 U. S. 37 (1971). "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a *clear-cut prohibition* qualified only by specifically defined exceptions." *Amalgamated Clothing Workers of America* v. *Richman Bros.*, 348 U. S. 511, 515-516 (1955) (emphasis added).

This Court has strictly enforced the Act and narrowly construed the exceptions. "On its face, the present Act is an *absolute prohibition* against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U. S. 281, 286 (1970) (emphasis added).

In *Atlantic Coast Line*, the respondents "intimated that the Act only establishes a 'principle of comity,' not a binding rule on the power of the federal courts." *Ibid.* The Court emphatically rejected that contention and held

> "that any injunction against state court proceedings otherwise proper under general equitable principles *must* be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, *the exceptions should not be enlarged by loose statutory construction.*" *Id.*, at 287 (emphasis added).

The essence of the District Court's opinion in *Brown* is that a federal court can stay state proceedings "if it is necessary to preserve [the federal] court's *potential*

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2. *Hill* is a civil case, but the principles underlying the Anti-Injunction Act apply with greater, not lesser, force in criminal cases. See *Juidice* v. *Vail*, 430 U. S. 327, 335 (1977).

jurisdiction." 743 F. Supp., at 317 (emphasis added). There is no such exception to the Anti-Injunction Act.

The page limit on this brief does not permit an extended discussion of the history of the Anti-Injunction Act. One is contained in our brief in the Court of Appeals in the present case. Briefly, however, there are only three exceptions in the Act. They are (1) exceptions expressly created by Congress, (2) injunctions "in aid of [the federal court's] jurisdiction," and (3) injunctions "to protect or effectuate its judgments."

The express exception is, of course, 28 U. S. C. § 2251, which is discussed in part III, *post*. The third exception is clearly inapplicable, because there is no judgment to protect or effectuate.[3]

This leaves the "aid of jurisdiction" exception. Where an action is *in rem* and the federal court has *first* acquired jurisdiction of the *res*, this exception authorizes the court to prevent state court interference. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229 (1922). It authorizes a federal court which has already issued an injunction in a case within its jurisdiction to enjoin the issuance of later, contrary injunctions by state courts. *Looney* v. *Eastern Texas R. Co.*, 247 U. S. 214, 221 (1918). It also authorizes "federal courts to stay proceedings in State cases removed to the district courts." Revision Note to 28 U. S. C. § 2283, at 445 (1988 ed.)

The exception definitely does not authorize a federal court to stay a state action merely to insure that the controversy will be determined in federal court rather than state court. This rule was recognized in *Kline*, *supra*, 260 U. S., at 232. It was reiterated by a unanimous Court, including the *Toucey* dissenters, in *Southern R. Co.* v. *Painter*, 314 U. S. 155 (1941). The 1948 revision expressly

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3. This exception was added in 1948 to overrule *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118 (1941) and adopt the view of the dissent in that case. See *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U. S. 518, 524 (1986). It authorizes a federal court to prevent relitigation in state court of issues already determined in federal court. See *Toucey*, at 152-153 (Reed, J., dissenting).

restored the law "as generally understood and interpreted prior to the Toucey decision." Revision Note, *supra*.

Vendo Co. v. *Lektro-Vend Corp.*, 433 U. S. 623 (1977) refutes the notion that a federal court has carte blanche authority to preserve the status quo against state court action. The parties in that case had filed breach of contract and antitrust suits in state and federal court, respectively. *Id.*, at 627. Vendo eventually received a judgment in state court of over seven million dollars, *id.*, at 628, enough to take control of both corporate defendants, *id.*, at 641.

The Federal District Court enjoined execution of the state judgment, relying on two independent bases of jurisdiction. First, the court believed that the injunction section of the Clayton Act was an express exception to the Anti-Injunction Act. Second, the court "found that collection efforts would eliminate two of the three plaintiffs and thus that the injunction was necessary to protect the jurisdiction of the court, within the meaning of that exception to § 2283." *Id.*, at 629.

Five Justices explicitly rejected the antitrust ground of jurisdiction on the facts before the Court. The majority was divided on the question of whether the Clayton Act could be an exception under other circumstances, however. *Id.*, at 640-641 (plurality opinion of Rehnquist, J.); *id.*, at 643 (Blackmun, J., concurring in the result).

On the second ground, the plurality relied on *Kline*, *supra*, and emphatically rejected the notion that preservation of the "case or controversy" constitutes an exception to the Anti-Injunction Act. "No case of this Court has ever held that an injunction to 'preserve' a case or controversy fits within the 'necessary in aid of its jurisdiction' exception; neither have the parties directed us to any other federal court decisions so holding." *Id.*, at 642.[4]

The concurring Justices expressed no disagreement with the plurality's analysis on the "aid of jurisdiction"

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4. The plurality also held that the factual basis for the District Court's holding was flawed. *Ibid.*

point, which was necessary to the judgment in which they concurred. *Vendo* can therefore be considered a majority holding on this point. Cf. *Horton* v. *California*, 496 U. S. 128, 136 (1990) (statement in plurality opinion not binding because unnecessary).

In summary, the Anti-Injunction Act is an absolute prohibition, not a discretionary admonition. The rule is broadly construed, and the exceptions are narrowly construed. The "aid of jurisdiction" exception is limited to its historical functions of enforcing the removal statutes, implementing previously entered decrees in pending cases, and retaining possession of the *res* in proceedings *in rem*. The only change in the 1948 revision was to overrule *Toucey* and authorize the federal courts to *prevent* relitigation of issues they had already decided. *Kline*, *Painter*, and *Vendo* establish that there is no general exception to preserve a controversy for federal adjudication.

B. The All-Writs Act.

1. Dean Foods.

The District Court in *Brown* based its jurisdiction on the All-Writs Act, 28 U. S. C. § 1651(a) and *FTC* v. *Dean Foods Co.*, 384 U. S. 597 (1966). *Dean Foods* is distinguishable on several grounds.

First and foremost, *Dean Foods* did not involve any legislative prohibition on injunctive relief. It was a pure case of searching for authority in the absence of any clear indication from Congress one way or the other. See *id.*, at 608. The difference between that type of case and one involving a prohibition on injunctions is critical.

A related distinction, and one nearly as important, is that *Dean Foods* does not involve the delicate relationship between state and federal courts. Federal injunction of state proceedings is a grave step, never to be taken lightly. See, *e.g.*, *Younger* v. *Harris*, 401 U. S. 37, 41, 43 (1971); *Demosthenes* v. *Baal*, 495 U. S. 731, 737 (1990).

Finally, *Dean Foods* involved a writ issued by an appellate court in a case which had already entered the federal adjudicatory process. The case was pending before

the Federal Trade Commission. 384 U. S., at 599. *Dean Foods* cited as authority cases in which appellate courts had issued orders in cases pending in the lower courts, which would later be appealed. *Id.*, at 603.

The District Court in *Brown* stated that *Dean Foods* is authority for pre-filing stays because the injunction issued before "the initial entry of [the] action into the *Article III* court system." 743 F. Supp., at 731 (emphasis added). There is nothing in *Dean Foods* or the authorities on which it relies to justify this distinction between Article I and Article III adjudicatory bodies.

The principal case relied on by *Dean Foods* is *Whitney Nat. Bank* v. *Bank of New Orleans & Trust Co.*, 379 U. S. 411 (1965). See *Dean Foods*, 384 U. S., at 604. *Whitney* is a ringing affirmation of the legitimacy and the wisdom of Congress's choice to substitute an administrative body in the place of the district court in certain specialized areas. *Whitney*, 379 U. S., at 420-421. *Dean Foods*, 384 U. S., at 604, also relies on *Continental Illinois National Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 675 (1935). That case, in turn, relies on the *Kline* v. *Burke Construction*, *supra*, for the proposition that "a federal court, *having first acquired jurisdiction* of the subject matter, could enjoin the parties . . . . " 294 U. S., at 675 (emphasis added). Where it is the *state* courts who have *first* acquired jurisdiction, *Dean Foods* provides no authority for a general power to enjoin them. Indeed, the District Court's interpretation of *Dean Foods* would amount to a judicial repeal of the Anti-Injunction Act.

2. Supreme Court stays.

The District Court in *Brown* noted that the Supreme Court and its Justices can and do issue stays of state court proceedings in cases where the certiorari petition has not yet been filed. *Brown* v. *Vasquez*, *supra*, 743 F. Supp., at 731, n. 8 (citing *California* v. *Velasquez*, 445 U. S. 1301 (1980) (Rehnquist, J., in chambers)). Contrary to the District Court's reasoning, this power and its source refute the existence of a similar power in district courts.

The Supreme Court is unique among federal courts. This Court alone has appellate jurisdiction over cases arising in the state courts. 28 U. S. C. § 1257. This unique jurisdiction calls for a unique power regarding stays, see *Atlantic Coast Line, supra*, 398 U. S., at 296, and Congress has provided one in 28 U. S. C. § 2101(f):

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . . "

The contrast between the wording of this statute and the wording of section 2251 is striking and significant. The Supreme Court may grant stays in cases merely "subject to review," but the district court on habeas corpus is limited to granting stays when a "proceeding is pending" before that court. Both provisions were adopted in the same act: the 1948 revision of Title 28. See Pub. L. No. 80-773, 62 Stat. 961-962, 966.

Congress knows how to unambiguously authorize pre-filing stays when it deems them necessary. The staying of state court action in a case which has not yet entered the federal system is a grave step. Congress has seen fit to allocate such power to this Court alone.

Supreme Court practice thus provides no authority for a comparable power in the district court. This Court's stay power derives from a special statute. Congress has conferred a unique power on the Supreme Court in order to discharge its unique responsibilities. Congress has also conferred a stay power on the federal habeas court, but that power is worded differently. The difference is intentional.

II. The application for stay and counsel cannot be "deemed" to be a petition.

Thompson argued in the court below that a habeas proceeding was "pending" upon the filing of the request for stay and counsel because that document could be "deemed" a habeas petition under the District Court's local rules is meritless. Appellee's Brief at 34-35. *Amicus* has found only one case supporting such an exercise, and the situation there was quite different. In *Studebaker Corp.* v. *Gittlin*, 360 F. 2d 692 (CA2 1966), the court held a hearing before the complaint was filed, but it issued the injunction afterwards. *Id.*, at 694. Under the facts of the case, *Studebaker* is authority for no more than the proposition that a court may deem an extensive affidavit, which contains the information required in a complaint, to be a complaint *for the purpose of holding a hearing* on whether to grant an injunction. Whether an injunction can actually issue without an actual complaint is another question.

A Supreme Court case closer to the present facts points in the opposite direction. In *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147 (1984), would-be plaintiff Brown claimed discriminatory treatment by her former employer, the Welcome Center. After exhausting administrative remedies with the Equal Employment Opportunity Commission (EEOC), she had 90 days to bring a civil action. *Id.*, at 148. Six weeks later, Brown filed a copy of her EEOC "right-to-sue letter" with the District Court and requested counsel. The magistrate mailed her the required form and questionnaire and reminded her of the deadline. Brown returned the questionnaire on the 96th day after the right-to-sue letter. She filed an "amended complaint" on the 130th day, 40 days past the deadline. *Ibid.*

This Court held that the EEOC letter could not be deemed a complaint. The Court noted that under Federal Rule of Civil Procedure 3 an action is commenced by filing a complaint. The District Court had determined "that the right-to-sue letter did not qualify as a complaint under Rule 8 *because there was no statement in the letter of the factual basis for the claim of discrimination, which is*

required by the Rule." *Id*., at 149 (emphasis added). Upholding this ruling, this Court rejected the Court of Appeals' notion that civil rights plaintiffs were somehow exempt out of a special solicitude for this class of plaintiffs. *Id*., at 149-150.

The complaint later filed, the Court went on to explain, could not "relate back" to the date of filing of the EEOC letter because that letter did not meet the very minimal requirements to constitute a complaint.

> "Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' [Citations.] *Because the initial 'pleading' did not contain such notice, it was not an original pleading* that could be rehabilitated by invoking Rule 15(c)." *Id*., at 150, n. 3 (emphasis added).

Baldwin County holds, therefore, that notwithstanding the liberal rules of modern pleading, there are limits beyond which a paper cannot be considered a pleading. A mere application for counsel, or even counsel's statement of "nonfrivolous" issues, is beyond the limit for a habeas corpus petition.

The habeas corpus application or petition is not governed by Rule 8 of the Federal Rules of Civil Procedure ("Civil Rules") but rather by 28 U. S. C. § 2241 and Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"). The Habeas Rules are an Act of Congress. Although originally promulgated by the Supreme Court, see 425 U. S. 1169, they were amended by Congress and approved as amended. See Pub. L. No. 94-426 § 1, 90 Stat. 1334 (1976).

In the Court of Appeals, Thompson attacked the state's argument that a petition must allege facts supporting a claim for relief. Such an argument, Thompson said, urges the court to usurp the legislative function. Appellee's Brief 33. This argument is precisely backwards. By

approving Habeas Rule 2(c), Congress has explicitly required that the petition "shall specify all the grounds for relief . . . and shall set forth in summary form the facts supporting each of the grounds thus specified." How clear must Congress be? Judicial disregard of this clear legislative requirement would usurp the legislative function.

It is true, of course, that a "petition for *habeas corpus* ought not to be scrutinized with technical nicety." *Holiday* v. *Johnston*, 313 U. S. 342, 350 (1941). But we are dealing with essentials here, not niceties. "Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief." *Brown* v. *Allen*, 344 U. S. 443, 461 (1953).

Congress has quite deliberately made the initial pleading requirements more strict for habeas petitions than for civil complaints in some respects. Civil complaints are generally signed by the attorney and usually need not be verified. Civil Rule 11. Habeas petitions must be verified, 28 U. S. C. § 2242, or signed under penalty of perjury, Habeas Rule 2(c). The rule requires the petitioner to personally sign the petition. *Ibid*. The statute permits "next friend" petitioners, but only under very limited circumstances. See *Whitmore* v. *Arkansas*, 495 U. S. 149, 163-164 (1990).

More importantly, section 2242 and Habeas Rule 2(c) retain "fact pleading" rather than the "notice pleading" of Civil Rule 8. " '[N]otice pleading' is not sufficient, for the petition is expected to state facts that point to a '*real possibility of constitutional error*.' See *Aubut* v. *State of Maine*, 431 F. 2d 688, 689 (1st Cir. 1970)." Advisory Committee Note to Habeas Rule 4 (emphasis added); see also 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 11.4, at 149 (1988). Even Professor Liebman, who calls this requirement "curious," *ibid*., and "anomalous," *id*., at 149, n. 3, grudgingly acknowledges two justifications for it. "First, . . . , habeas corpus is in fact designed to review and draws heavily on the record of prior state proceedings . . . . Second, fact pleading . . . enables courts . . . to separate substantial petitions from

insubstantial ones quickly and without need of adversary proceedings." *Ibid*.

The second reason is particularly pertinent here. If the petition fails to state facts which, if true, would entitle the petitioner to relief, there is nothing to consider. See *Hill* v. *Lockhart*, 474 U. S. 52, 60 (1985); *id*., at 62 (White, J., concurring). If the factual basis of the claim has already been decided in a state proceeding entitled to deference, it is error to grant a stay. *Demosthenes* v. *Baal*, 495 U. S. 731, 737 (1990).

Barefoot v. *Estelle*, 463 U. S. 880, 894 (1983) established that "it is entirely appropriate that an appeal which is 'frivolous and entirely without merit' be dismissed after the hearing on a motion for a stay." Absent an unresolved and constitutionally significant factual issue, consideration of the petition by the district court is no different.

There is an irreducible minimum below which a paper cannot be deemed a petition. It must be verified or signed under penalty of perjury. It must be signed by the petitioner absent extraordinary circumstances. Most importantly, it must serve the basic function of identifying the claims and their factual basis. The papers on file at the time the District Court granted the stay in the present case did not meet this essential requirement. The local rulemaking authority does not include the power to contradict the habeas statutes and rules. See *Frazier* v. *Heebe*, 482 U. S. 641, 646 and n. 4 (1987). The local rules, therefore, cannot permit these papers to be "deemed" a petition.

III. A proceeding is "pending" under § 2251 when the petition is filed and not before.

The crux of this case is when a habeas corpus proceeding is "pending." Authority on the question is sparse, simply because very few litigants have had the effrontery to ask a court for relief before they have filed a complaint. See *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 30 (1989)

(assuming courts precluded from granting TRO before complaint filed). What little authority exists, however, is uniformly against the *Brown* court's conclusion. Even the most partisan of the pro-petitioner commentators states unquestioningly that the petition is a prerequisite to federal jurisdiction as the law now stands. 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 11.1, at 145 (1988).

A. Civil Cases Generally.

In re Connaway, 178 U. S. 421 (1900) appears to be the only direct authority for when an action begins so as to make it "pending." Connaway filed a complaint in the Circuit Court for the Ninth Circuit against Overton, but he was unable to serve it before Overton died. He then obtained a writ of *scire facias* to substitute the executor of Overton's estate as a party. *Id.*, at 423. A federal statute authorized the issuance of the writ "from the office of the clerk of the court where the suit is *pending*." *Id.*, at 425 (emphasis added).

The circuit court granted the executor's motion to set aside the *scire facias* on the ground that no suit had been pending at the time of Overton's death, because he had not been served. Connaway applied to the Supreme Court for a writ of mandamus.

> "When can a suit be said to be 'in any court of the United States,' or said to be 'pending' therein? Is not the answer inevitable, from the time the suit is commenced? *It cannot be pending until it is commenced,* and if it continue until the death of the 'plaintiff or petitioner or defendant,' the requirements of the section seem to be satisfied.
>
> "Another inquiry becomes necessary — when is a suit commenced? For an answer we must go to the California statutes.[5] By section 405 of the Code of

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5. At this time federal courts adopted the procedural statutes of the states in which they sat, absent an applicable federal statute. See 2 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 1.02[1], at 1-5 (2nd ed. 1991).

> Civil Procedure, it is provided: 'Civil actions in the courts of this State are commenced by filing a complaint.' . . . *The filing of the complaint, therefore, is the commencement of the action and the jurisdiction of the court over the case.*" *Id.*, at 427-428 (emphasis added).

Connaway thus squarely holds that in a court governed by a commencement rule equivalent to former section 405 of the California Code of Civil Procedure, a suit is not in the court and is not "pending" until the complaint is filed. Rule 3 of the Federal Rules of Civil Procedure is indistinguishable from the statute construed in *Connaway*: "A civil action is commenced by filing a complaint with the court." The rule of *Connaway* is therefore the rule today in federal civil cases. See *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147, 149-150 (1984).

B. Habeas Corpus Cases.

The *Brown* court, presented with the clear authority of *Connaway* and *Baldwin County*, nonetheless found that the purpose of habeas corpus permits the federal courts to make an exception to the usual rules and consider a habeas corpus proceeding "pending" as soon as the prospective petitioner asks for counsel. 952 F. 2d, at 1168. The court's analysis is backwards. The differences between habeas corpus and other cases call for stricter requirements for a stay, not more lax requirements.

"The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). Ignoring this principle, the Court of Appeals quotes *Bounds* v. *Smith*, 430 U. S. 817, 828 (1977) out of context for the proposition that federal habeas corpus review of state convictions "is, in essence, 'the *first* line of defense against constitutional violations.' " 952 F. 2d, at 1166 (emphasis added). Once again, the Ninth Circuit is acting as if state courts do not exist, despite repeated admonitions by this Court. See, *e.g.*, *Sumner* v. *Mata*, 455 U. S. 591, 597-598 (1982); *Lewis* v. *Jeffers*, 111 L. Ed. 2d 606, 622-623, 110 S. Ct. 3092, 3102 (1990); *Estelle* v.

McGuire, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475, 480 (1991).

In *Bounds*, the prison inmates sought access to a law library in order to prepare a variety of pleadings, which included state collateral proceedings and state and federal civil rights actions, as well as federal habeas. See 430 U. S., at 828, n. 17. In the course of contrasting these actions with discretionary appeals following a first appeal as of right, the *Bounds* Court referred to the group collectively as the "first line of defense." This contrast was necessary to distinguish *Ross* v. *Moffitt*, 417 U. S. 600 (1974), which involved counsel on discretionary appeals. The crucial difference, said *Bounds*, was that in *Moffitt* the prisoners were "likely to have appellate briefs previously written on their behalf, trial transcripts, and often intermediate appellate court opinions to use in preparing petitions for further review." 430 U. S., at 827.

So it is in the present case. Capital defendants in California are provided counsel not only on appeal but also on the state habeas petition. See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Rule 3, Deering's Cal. Codes, 2 Rules of Court 262-265 (1992 Supp.) ("Cal. Supreme Court Policies"). Unlike the brand new cases envisioned by the *Bounds* Court, California capital defendants have the benefit of extensive briefing *and investigation*, *id.*, ¶ 2-2, at 264, by state-paid attorneys followed by comprehensive review by the state's highest court, Cal. Penal Code § 1239(b), before the case ever enters the federal system. The Court of Appeals' discourse about unprepared, *pro se* petitioners, 952 F. 2d, at 1167-1168, inexplicably ignores the great lengths to which California has gone to provide representation.

It is quite true, as the *Brown* court said, that the Federal Rules of Civil Procedure do not apply where they are inconsistent with the Habeas Rules. Habeas Rule 11. But Civil Rule 3 is entirely consistent with both the letter and the spirit of the Habeas Rules.

The people of California have litigated this case to final judgment. The case has been thoroughly reviewed

and affirmed by the highest court of the largest state of the Union. A presumption of finality and legality has attached. *Barefoot*, *supra*, 463 U. S., at 887. The people have a powerful interest in executing their judgment. *In re Blodgett*, 116 L. Ed. 2d 669, 674, 112 S. Ct. 674, 676 (1992). Indeed, enforcement of the law against murder is the single most important function of state government. Congress has authorized the federal courts to delay the enforcement of such judgments, but *only* upon a showing of a "real possibility of constitutional error." Advisory Committee Note to Habeas Rule 4, *supra*. As Rule 4 recognizes, there may not be any substantial federal question. Each of the petitioner's claims may be either (1) not truly federal, see *Estelle* v. *McGuire*, *supra*, 116 L. Ed. 2d, at 396, n. 2, 112 S. Ct., at 480; (2) precluded by state court fact-finding, see *Lewis* v. *Jeffers*, *supra*, 111 L. Ed. 2d, at 622-623, 110 S. Ct., at 3102; (3) proposals for "new rules" precluded by *Teague* v. *Lane*, 489 U. S. 288 (1989); or (4) simply insubstantial.

The rule of *Connaway*, *Baldwin County*, and Civil Rule 3 that a proceeding is commenced only upon the filing of a complaint/petition is fully consistent with the procedure for preliminary review set forth in Habeas Rules 2 and 4. These rules contemplate a screening process to summarily dispose of meritless petitions. See also 28 U. S. C. § 2243, para. 8. The clear import of these rules is that the state is entitled to proceed with the execution of its judgment absent a showing of a "real possibility of constitutional error." That cannot be done if stays are issued without any showing at all.

Arguments have been made for an automatic stay on the first habeas petition in capital cases. See, *e.g.*, L. Powell, et al., Ad Hoc Committee on Federal Habeas Corpus in Capital Cases: Committee Report and Proposal 7 (1989) ("Powell Committee Report"). Congress has not yet seen fit to adopt these proposals. The Congressional mandate that the state has a right to proceed with its judgment in the absence of a substantial claim remains in force. Unless the defendant is required to file his petition

before obtaining a stay, there is no way to carry out that mandate.

IV. Practical alternatives exist.

Although fundamental principles of federal jurisdiction uniformly point to a lack of jurisdiction, the Ninth Circuit attempts to justify its policy of granting these stays with the dire prospect of a capital defendant being executed before his first federal petition could be filed. 952 F. 2d, at 1168-1169. Jurisdictional questions do not require practical answers, not even in habeas cases. *Ex parte Kearney*, 7 Wheat. (20 U. S.) 38, 45 (1822); see also *Atlantic Coast Line*, *supra*, 398 U. S., at 294. Nonetheless, it is worth noting that with reasonable diligence on the part of the habeas petitioner and his attorney, the problem raised by the court below is readily avoidable.

The California Supreme Court routinely grants stays of execution pending certiorari to this Court. See Cal. Supreme Court Policies, *supra* p. 16, Rule 1, at 262-263.[6] Certiorari is not required for exhaustion, however. *Fay* v. *Noia*, 372 U. S. 391, 435 (1963), overruled on other grounds in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991). Work on the habeas petition can begin immediately. Counsel has three months to file the certiorari petition, Supreme Court Rule 13.1, and this Court typically takes several months to rule on it. The initial setting of an execution date then takes at least 60 days, usually 90. Cal. Penal Code § 1193. Thus, an inmate who applies for counsel promptly upon exhaustion of state remedies will have the better part of a year to

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6. Under the system of unified review adopted while Thompson's case was on appeal, the state habeas petition is filed in the Supreme Court after the direct appeal reply brief but before argument. Cal. Supreme Court Policies, *supra* p. 16, Rule 3 ¶ 1-1.1, at 263. The petition is dismissed before decision of the appeal if it is insubstantial or consolidated with the appeal if it is substantial. See, *e.g.*, *People* v. *Gonzalez*, 51 Cal. 3d 1179, 1240, 800 P. 2d 1159 (1990). State remedies are thus exhausted upon decision of the direct appeal.

obtain counsel and file the petition.[7] Cf. Powell Committee Report, *supra*, at 6 (six months sufficient).

The Court of Appeals made much of the rule of *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) in holding that pre-filing stays are necessary. See 952 F. 2d, at 1166-1167. This reliance is misplaced. It ignores the very substantial resources the state has already provided for investigation of potential claims. See *ante*, at 16. Federal habeas counsel need not investigate the case from scratch, but only review and supplement a completed investigation. See, *e.g.*, *Antone* v. *Dugger*, 465 U. S. 200, 206 (1984) (claim readily available in state pleadings).

Rose v. *Lundy*, 455 U. S. 509, 520 (1982) "provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." Before a death row inmate ever gets to federal habeas, California has provided him with the forum, the counsel, and the investigative resources to comply with that direction. The cards should all be on the table by this point.

It is ironic indeed that while the district courts in all the other states with capital punishment discharge their duties without pre-filing stays, the rule in question here has been adopted in the state where it is least necessary. The time available to the diligent petitioner is sufficient, given the extensive state review and the "secondary and limited" role of federal habeas corpus. In addition to being illegal, the rule purporting to authorize a pre-filing stay is unnecessary.

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7. There is no inconsistency in permitting a court to consider motions to appoint counsel or proceed *in forma pauperis* before the "commencement" of a proceeding. See *Baldwin County*, *supra*, 466 U. S., at 148; 42 U. S. C. § 2000e-5(f)(1). Such motions impact only the court and the treasury, not the rights of the adverse party. Compare 28 U. S. C. § 2251 ("proceeding is pending") with 18 U. S. C. § 3006A(a)(2) ("person who . . . is seeking relief").

V. *Demosthenes* v. *Baal* accurately summarizes the controlling principles.

Demosthenes v. *Baal*, 495 U. S. 731 (1990) states that "federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances." *Id.*, at 737. Although no citation is given, this is a statement of the fundamental principle established by the authorities in part I, *supra*. The Anti-Injunction Act bars federal interference absent an exception, and section 2251 is the only relevant exception.

"Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power. In this case, that basis was plainly lacking. The State is entitled to proceed without federal intervention." *Ibid.*

CONCLUSION

The judgment of the Court of Appeals should be summarily reversed.

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Respectfully submitted,

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